First Supplement to Memorandum 2022-10
Bail, Pretrial Release and Related Matters
Panelist Materials

Memorandum 2022-10 gave an overview of bail, pretrial release, and other related matters. This supplement presents and summarizes written submissions from panelists scheduled to appear before the Committee on October 11, 2022.

Exhibit

Discussion Panel 2:
Data Overview

Kate Weisburd, Associate Professor of Law, the George Washington University Law School
Professor Weisburd's submission addresses the need for reform in the use of electronic monitoring, which has seen an exponential expansion in recent years. Professor Weisburd shares several key findings of research she conducted on the use of electronic monitoring on people on probation, parole, and pretrial release in 44 states, including five California counties. According to her research, electronic monitoring is not an alternative to jail, as is commonly assumed, but instead restricts liberty, limits privacy, disrupts family relationships, and jeopardizes financial security. Professor Weisburd recommends imposing strict limits on when monitoring can be ordered, eliminating reincarceration for technical violations, and establishing a presumption that a person subject to electronic monitoring be removed after no more than 30 days, among other recommendations.

Discussion Panel 3:
Perspectives from the Bench

Hon. J. Richard Couzens (Ret.)
Judge Couzens' submission is a memorandum describing bail law after the California Supreme Court's *Humphrey* decision. The memo outlines key elements of *Humphrey* and offers practical guidance for how the decision impacts pretrial release decisions in courts. In addition, Judge Couzens noted several unresolved legal issues, including the interplay between sections 12 and 28(f)(3) of article 1 of the California constitution, the meaning of "ability to pay," and the standard and basis for pretrial detention.

Hon. Lisa Rodriguez, San Diego County Superior Court
Judge Rodriguez's submission is a comprehensive checklist for bail and pretrial release decisions intended to be used by judges making these determinations.

Hon. Brett Alldredge, Tulare County Superior Court
Drawing from his experience conducting bail and pretrial detention hearings in the mid-sized rural county of Tulare, Judge Alldredge describes the use of financial conditions as practically the exclusive tool for determining pretrial detention or release in California. Judge Alldredge explains his view that courts have long misunderstood the state's Constitutional provisions on bail, which were created as a means to allow arrested people to be released, but are now used to keep people in custody. According to Judge Alldredge's review of thousands of bail orders issued in his county, many bail orders are unsafe and

unfair. Among other things, he recommends that California establish a system of presumptive release with individualized conditions, except for a narrow and specific set of defined offenses and circumstances which would warrant detention.

Hon. George Eskin (Ret.)
Judge Eskin's submission asserts that California's cash bail system has changed from one intended to provide a method of release from custody into one used for detaining people in custody. He makes several recommendations to update the system, including adopting a statement on the purpose of bail in the Penal Code, requiring the Judicial Council to establish a statewide bail schedule, and ensure equal treatment for people arrested on bench warrants, who may not be considered for the same pretrial assessments that others are.

Discussion Panel 4: Perspectives from Practitioners

Tiffanie Synnott, Supervising Public Defender, Sacramento County
Ms. Synnott's submission describes a new pretrial approach in Sacramento County that supports a quality bail hearing, reduces incarceration, and improves public safety. By providing early access to counsel and an interview-based needs assessment, the Sacramento County Public Defender Pretrial Support Project collects individualized information that advocates can use to coordinate supportive services that can be in place upon release and to persuade a court in the person's suitability for release. She proposes several revisions to the Penal Code that would support higher quality bail hearings, including adopting clear legal standards regarding the procedure and kind of evidence used at a bail hearing, requiring earlier access to counsel, redefining standards for failure to appear to include willfulness, and expanding the list of permissible factors a court may consider when determining bail.

Bill Armstrong, President, California Bail Agents Association
Mr. Armstrong's submission asserts that recent attempts to reform the cash bail system have failed because COVID-19 $0 bail policies did not hold people accountable and resulted in numerous rearrests. Unlike $0 bail, cash bail holds the bail agent, the accused person, and their friends and relatives financially accountable for returning to court. Mr. Armstrong concludes that *Humprhey's* requirement that courts consider a person's ability to pay when setting bail abates any need for legislative reforms.

Jeffrey Clayton, Executive Director, American Bail Coalition
Mr. Clayton's submission advises a cautious approach to bail reform. He recommends better data collection to help determine how reform is or is not

working, prompt bail hearings to help people receive quick and meaningful due process, and the development of a statewide, universal bail schedule. He cautions against any form of pretrial detention based on future dangerousness because it is inconsistent with the constitution, centuries of history, and opens the door to expanded supervision of defendants. He further argues against the use of unsecured or partially secured bonds because the promised portion is difficult to collect by courts.

Discussion Panel 5: Insights from Other Jurisdictions

Alison Shames and Matt Alsdorf, Center for Effective Public Policy
Ms. Shames and Mr. Alsdorf are experts in pretrial reform at the Center for Effective Public Policy and their submission offers insights based on their work with dozens of jurisdictions, including Illinois, New Jersey, and New York, on advancing pretrial improvements. Among other recommendations, they stress that pretrial detention must be shaped by a "muscular limiting process," both in substance and procedure so it is used sparingly and intentionally, arraignments must be conducted promptly within 24-48 hours of an arrest, courts should impose only the least restrictive conditions necessary They also recommend accounting for implementation challenges at the local level, engaging with diverse stakeholders, and using data to get people on board with improvements. Once implemented, they recommend involvement and engagement with key stakeholders and the robust collection of data to inform solutions.

Additional Presentations

Professor Sandra Susan Smith, Daniel & Florence Guggenheim Professor of Criminal Justice, Harvard Kennedy School and Director, Malcolm Wiener Center for Social Policy
Professor Smith's submission, which was recently prepared as part of a series of discussion papers for Arnold Ventures, highlights the many negative impacts of pretrial detention and the growing body of research indicating that releasing an increased number of people pretrial does not threaten public safety. She explains that the traditional metrics of public safety in the context of pretrial release — failure to appear and recidivism rates — are inadequate measures and that other metrics, such as whether people are able to meet their basic needs, impact whether communities are safe. In particular, research shows that pretrial detention is often a far greater threat to public safety than pretrial release, in part because detention increases the risk that low-risk individuals may reoffend.

Sue Burrell, Policy Director Emeritus, Pacific Juvenile Defender Center
Ms. Burrell's submission highlights the inconsistent application of the Fourth Amendment requirement that judges promptly — and no more than 48 hours after arrest — review every warrantless arrest and determine if it was supported by probable cause. Though the United States Supreme Court clarified this requirement in 1991 in *County of Riverside v. McLaughlin*, a case arising from California, the state has not updated the Penal Code to conform with the ruling. Ms. Burrel also notes that, under California Supreme Court case law, similar determinations in juvenile cases are allowed to occur 72 hours after arrest. Ms. Burrell shares survey data indicating inconsistency across counties in how and when probable cause hearings are conducted in both adult and juvenile cases. Among other things, Ms. Burrell recommends that the holding of *Riverside v. McLaughlin* be codified in statute for both adults and juveniles.

Additional Materials

Letter from The Bail Project
The Bail Project, which is a national nonprofit that pays bail for people in need and advocates for pretrial reform, recommends several reforms to California's system of pretrial release and detention, including: expansion of pretrial data collection and reporting, which would better highlight the successes and problem points of our pretrial system; limiting the use of electronic monitoring and establishing review at fixed intervals; clarifying ability to pay standards; reforming bail schedules; and addressing parole and mandatory supervision violations.

Respectfully submitted,

Thomas M. Nosewicz
Legal Director

Joy F. Haviland
Senior Staff Counsel

Rick Owen
Senior Staff Counsel

Exhibit A

Kate Weisburd

George Washington University Law School

Written Submission to the California Committee on Revision of the Penal Code

Kate Weisburd, Associate Professor of Law, George Washington University School of Law

October 11, 2022

Introduction

Thank you for the opportunity to comment on the use of pretrial electronic monitoring and the need for reform. By way of introduction, I am a law professor at George Washington University School of Law and my area of expertise is the use of surveillance technology to track, monitor and control people involved in the criminal legal system.[1] Prior to joining academia, I was an attorney at the East Bay Community Law Center in Berkeley, California where I represented young people charged with crimes who were ordered to wear ankle monitors. Based on my practice experience in California, as well as my academic research, I am very familiar with the use of electronic monitoring in the pretrial and post-conviction settings.

The Committee asked me to address the harms of pretrial electronic monitoring, legal concerns, and suggested reforms. In anticipation of my testimony, I offer the following written statement, including links to additional information.

I. The Operation of Pretrial Electronic Monitoring

The combination of the COVID-19 crisis in prisons and jails, the influence of private electronic monitoring companies and bail reform efforts has triggered an exponential expansion in the use of GPS-equipped ankle monitoring.[2] This expansion is occurring despite the lack of evidence that monitoring is more effective than less invasive means of supervising people pretrial, including no supervision or lighter-touch supervision. In some places, the increased use of pretrial monitoring has also not resulted in a decrease in local jail populations. In San Francisco, for example, both monitoring and intensive pretrial supervision have expanded in use, while the jail population has remained the same.[3]

Without significant reform and limits, the current use of pretrial electronic monitoring risks reinforcing the precise racial and economic inequities that bail reform efforts sought to address. As researchers, advocates and activists have exposed, electronic monitoring is not an alternative to jail, it is an alternative *form* of jail.[4] Although not confined to a physical jail cell, electronic

---

[1] I have published and co-authored several papers and short articles on the topic of electronic surveillance: James Kilgore, Emmett Sanders & Kate Weisburd, *The Case Against E-Carceration*, Inquest (July 30, 2021); Kate Weisburd, *Punitive Surveillance*, 108 Va. L. Rev. 147 (2022); Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. Rev. 717 (2020).

[2] *See* Marion Diaz, *Harris County electronic monitor population skyrockets to nearly 4,000*, Houston NBC (Oct. 15, *2021);* Chicago Appleseed Fund For Justice, *Electronic Monitoring Review: Cook County*, Sept. 2022; Eli Hager, *Where Coronavirus Is Surging—And Electronic Surveillance, Too*, Marshall Project (Nov. 22, 2020); April Glaser, *Incarcerated at home: The rise of ankle monitors and house arrest during the pandemic*, NBC News (July 5, 2021).

[3] Johanna Lacoe, Alissa Skog, And Mia Bird, *Bail Reform in San Francisco: Pretrial release and intensive supervision increased after Humphrey*, California Policy Lab, May 2021.

[4] James Kilgore, *Understanding E-Carceration*, 2022; Aaron Cantú, *When Innocent Until Proven Guilty Costs $400 a Month—and Your Freedom*, The Bail Project and Vice (May 28, 2020); Chi. Cmty. Bond Fund, Punishment is Not a "Service": *The Injustice of Pretrial Conditions in Cook County, Chicago Community Bond Fund* (Oct. 24, 2017); Sandra Susan Smith and Cierra Robson, *Between a Rock and a Hard Place: The Social Costs of Pretrial Electronic Monitoring in San Francisco*, HKS Faculty Research Working Paper Series, September 2022; Chaz Arnett, *From Decarceration to E-carceration*, 41 Cardozo L. Rev. 641, 663 (2019).

monitoring, like jail, restricts liberty, limits privacy, disrupts family relationships, and jeopardizes financial security.[5]

To better understand how electronic monitoring operates, a team of research assistants and I collected and analyzed the specific policies, procedures and rules that govern the use of electronic monitoring of people on probation, parole, and pretrial release in 44 states and the District of Columbia.[6] Although this research was national in focus, records five California counties (Los Angeles, Sacramento, Orange, San Diego and San Francisco) were part of the study. The findings of our research are also consistent with three studies that specifically examined monitoring practices in Los Angeles County, San Francisco County and in the juvenile court system in California.[7] What follows are the key findings:

Imprisoned at home. People on monitors are almost always required to remain in their home and cannot leave unless they obtain pre-approval—a process that is often not clear and requires days of advance planning. For example, in most places, going to job interviews, the store, the doctor or driving a child to school, all require pre-approval. Failure to obtain permission may result in reincarceration.

No privacy. Agencies in every state contract with private companies to track, analyze and store location, activity, and movement data. This data is often shared with police, courts, and other agencies. Most records in our study were silent as to privacy protections or rules governing the use of the data. In many places, ankle monitors also have audio features that allow for supervising agents to speak with and listen to people on monitors, or the device has a beeping feature that alerts everyone in earshot of the person on the monitor.

Numerous and vague rules. People on monitors are required to comply with dozens of complex, restrictive and overlapping rules. People on monitors must comply with both rules governing general pretrial release, as well as rules governing monitoring. Rules are often vague and broad. For example, in some places, people on monitors cannot associate with people of "disreputable character" or "bad reputation" and must conduct themselves in an "orderly manner" or with "acceptable behavior."

Onerous charging requirements. People on monitors must charge their devices at regular times every day and for a predetermined and significant number of consecutive hours, sometimes two or more hours at a time. Failure to comply with charging requirements may result in reincarceration.

Undermines autonomy and dignity. People on monitors are subject to a range of restrictions that invade personal and family life and undermine autonomy and dignity. In most places, people on monitors are limited in where, and with whom, they can live and are subject to random home

[5] For a detailed comprehensive critique of pretrial electronic monitoring, *see* Patrice James, et. al., *Cages Without Bars: Pretrial Electronic Monitoring Across the United States*, Shriver Center on Poverty Law, Media Justice, Chicago Appleseed, Sept. 2022.

[6] Weisburd et al., *Electronic Prisons: The Operation of Electronic Monitoring in the Criminal Legal System*, Gwu Legal Stud. Rsch. Paper No. 2021-41, Gwu L. Sch. Pub. L. Rsch. Paper No. 2021-41 (Sept. 27, 2021).

[7] *See* Alicia Virani, *Pretrial Electronic Monitoring in Los Angeles County: 2015 through 2021*, UCLA School of Law Criminal Justice Program, 2022; Smith, Sandra Susan, and Cierra Robson, Between a Rock and a Hard Place: The Social Costs of Pretrial Electronic Monitoring in San Francisco, HKS Faculty Research Working Paper Series, September 2022; Samuelson Law, Tech. & Pub. Policy Clinic & E. Bay Cmty. Law Ctr., *Electronic Monitoring Of Youth In The California Juvenile Justice System* (2017).

searches, exposing everyone in the house to unpredictable privacy invasions. Family members, friends and employers are often required to help supervise the person on a monitor, thus placing them in the role of *de facto* supervising agent.

Wealth & resource extracting. Even in places that do not charge administrative fees to people who are ordered to wear a monitor (like California), there are still other costs. People on monitors are often required to maintain a landline or cellphone as a condition of being placed on a monitor, and their ability to obtain and maintain employment is often jeopardized because of the monitoring requirements. Because they are often confined to their home. people on monitors are also unable to provide care or transportation for dependent family members, thus requiring additional resources to cover those vital tasks.

Monitoring sets people up to fail and risks reincarceration. The number and nature of monitoring rules, combined with the capacity of surveillance technology, facilitates the perfect detection of inventible imperfections with technical rules, which in turn drives reincarceration.

Private surveillance companies profit from, and influence, all aspects of monitoring. Electronic monitoring is controlled by a small number of companies, all of which recoup millions of dollars in profit**.** These companies contract directly with public agencies, and sometimes with individual people charged with crimes.

II. Legal & Policy Concerns with Pretrial Electronic Monitoring

What follows are some legal and policy concerns with the current operation of pretrial electronic monitoring. Given that people pretrial are presumed innocent, these constraints on basic constitutional rights are especially concerning.

Electronic Monitoring Improperly Infringes on Fourth Amendment Rights & Privacy. Electronic monitoring, as well as police use of the data generated by ankle monitors, is governed by the Fourth Amendment.[8] According, there must be a legal basis for these searches and there is often no such basis. Although there is not uniformity among courts on this issue, at least two state supreme courts struck down electronic monitoring as unreasonable searches under the Fourth Amendment.[9] In those cases, the courts found that the significant privacy intrusions of electronic monitors outweighed the government interest in tracking people.[10] In most places, including in California, people on monitors are also subject to additional privacy intrusions in the form of four-way search clauses that allow for law enforcement agencies to search their home and property at any time without a warrant or any level of suspicion. The ACLU of Northern California recently filed a lawsuit challenging this practice in San Francisco.[11]

Electronic Monitoring is Often Not a True Alternative to Jail. The common assumption is that but for electronic monitoring, people would otherwise remain in custody. This assumption is

[8] *Grady v. North Carolina*, 575 U.S. 306, 309 (2015).
[9] *Com. v. Norman*, 142 N.E.3d 1, 10 (Mass. 2020); *Com. v. Feliz*, 119 N.E.3d 700, 692–93 (Mass. 2019); *State v. Grady*, 831 S.E.2d 542, 556 (N.C. 2019).
[10] Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. Rev. 717 (2020).
[11] *ACLU Lawsuit Challenges San Francisco Sheriff's Unconstitutional Search and Surveillance Conditions for Pretrial Electronic Monitoring*, ACLU Press Release, Sept. 8, 2022.

suspect for two reasons. First, there is no clear evidence that most people currently on ankle monitors would — or should — otherwise be in jail. Perhaps some people would otherwise be incarcerated, but many would (or should) not. In practice, monitoring may be used on people who could be released on their own recognizance or be supervised with less invasive and restrictive methods. Second, even in cases where monitoring is in fact being used as an alternative – in other words, the person would otherwise remain in custody – there is no evidence that monitoring is used as a perfect substitution. Rather, people on monitors often spend a few days in jail before being released on a monitor and (or) spend months cycling in and out of jail for technical violations.[12] It is rarely a question of one day of electronic monitoring versus one day in jail – it is most often both for varying amounts of time.

Electronic Monitoring is Often an Unnecessary Condition of Pretrial Release. Pursuant to the California Supreme Court's decision in *Humphrey*, courts are required to impose the least restrictive conditions necessary to ensure future court appearances and protect public safety. Monitoring must be viewed for what it is: very restrictive. As the Massachusetts Supreme Court recently observed: "When a judge orders GPS tracking, a 'modern-day 'scarlet letter'' is physically tethered to the individual, reminding the public that the person has been charged with or convicted of a crime."[13] There is also no evidence that the use of monitoring correlates with lower rates of failure to appear or lower risks to public safety, as compared to less invasive methods of support.[14] Assistance with transportation to court and court date reminders are two examples of support for people on pretrial release that are significantly less invasive than monitoring.[15]

Electronic Monitoring Reflects the "New Jim Code."[16] Electronic monitoring builds on decades of surveillance as a mode of racial control.[17] As Professor Michelle Alexander, author of *The New Jim Crow*, observed: "digital prisons are to mass incarceration what Jim Crow was to slavery."[18] In San Francisco, Black people make up around 4 percent of the general population but around 50 percent of the people on electronic monitors.[19] In Chicago, Black people comprise 23 percent of the general population, but up to 74 percent of people subjected to monitors.[20]

---

[12] *See* Chicago Appleseed Center for Fair Courts and Chicago Council of Lawyers, *10 Facts about Pretrial Electronic Monitoring in Cook County*, September 2021; Kate Weisburd, *Punitive Surveillance*, 108 Va. L. Rev. 147 (2022).
[13] *Norman*, 484 Mass. at 338–39.
[14] *See* Alicia Virani, et al, *Creating A Needs-Based Pre-trial Release System: The False Dichotmy of Money Bail Versus Risk Assessment Tools*, UCLA School of Law, Criminal Justice Program, 2020, pg. 18; Chicago Appleseed Fund For Justice, *Electronic Monitoring Review: Cook County*, Sept. 2022.
[15] Rethinking Electronic Monitoring: A Harm Reduction Guide, ACLU (Sept. 2022).
[16] Ruha Benjamin, *Race After Technology: Abolitionist Tools For The New Jim Code* (2019).
[17] Simone Browne, *Dark Matters* (2015); Malkia Amala Cyril, *Black America's State of Surveillance*, The Progressive (March 30, 2015).
[18] Michelle Alexander, Opinion, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018).
[19] Patrice James, et. al., *Cages Without Bars: Pretrial Electronic Monitoring Across the United States*, Shriver Center on Poverty Law, Media Justice, Chicago Appleseed, Sept. 2022.
[20] *Id.*

Electronic Monitoring is Uniquely Harmful to Certain Groups. The requirements of electronic monitoring are especially challenging for young people,[21] people with disabilities, mental illness, and those experiencing housing insecurity.[22] Life on a monitor means complying with sometimes upwards of 50 different rules, having regular access to electricity for a set amount of time (sometimes two or more hours at a time), and the capacity and ability to plan daily schedules at least 48 hours in advance. Compliance with these requirements is challenging for anyone, but compliance is particularly hard for more vulnerable groups of people.

III. Recommendations

Despite the significant harm caused by pretrial monitoring, and the lack of evidence suggesting its effectiveness, California counties continue to expand their contracts with private surveillance companies. Although data is limited, at least seven California probation departments increased their funding for monitoring between 2020 and 2022.[23] For example, Los Angeles County recently approved a $1.4 million increase for its monitoring program, a 159% increase in the budget.[24] This expansion is concerning. These public funds should be redirected away from monitoring and invested in programs outside the criminal legal system that more effectively support people on pretrial release.

To the extent that monitoring continues to be used, there are several reforms that could help guard against net-widening concerns and overly restrictive and invasive rules.[25] This Committee should consider the following recommendations:[26]

1. ***Impose Strict Limits***. Pretrial release without electronic monitoring should be the presumption in all cases.

2. ***Develop Less Restrictive Options for Supporting People on Pretrial Release.*** Court date reminders, assistance with transportation to court, and other "light-touch" methods should be

[21] Catherine Crump, *Tracking the Trackers: An Examination of Electronic Monitoring of Youth in Practice*, 53 U.C. DAVIS L. REV. 795 (2019); Chaz Arnett, *Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts*, 108 J. CRIM. L. & CRIMINOLOGY 399 (2018); Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297 (2015).

[22] Smith, Sandra Susan, and Cierra Robson, *Between a Rock and a Hard Place: The Social Costs of Pretrial Electronic Monitoring in San Francisco*, HKS Faculty Research Working Paper Series, September 2022.

[23] Alicia Virani, Stephanie Campos-Bui, Rachel Wallace, Cassidy Bennett, Akruti Chandrayya, *Coming Up Short: The Unrealized Promise of In re Humphrey* (Forthcoming 2022, on file with California Committee on Revision of the Penal Code).

[24] *Id.*

[25] Both New York State and Illinois recently passed legislation aimed at reforming and limiting the use of electronic monitoring and other restrictive conditions of release. *See* N.Y. Crim. Proc. Law § 510.40; Ill. Public Act 101-0652 (Pretrial Fairness Act). California also just passed a new law that reforms the use of monitoring in juvenile court. *See* Cal. Assembly Bill 2658.

[26] Many of these recommendations were inspired by the following: James Kilgore, Myaisha Hayes, *Guidelines for Respecting the Rights of Individuals on Electronic Monitors*, Media Justice (2019); Patrice James, et. al., *Cages Without Bars: Pretrial Electronic Monitoring Across the United States*, Shriver Center on Poverty Law, Media Justice, Chicago Appleseed (Sept. 2022); Rethinking Electronic Monitoring: A Harm Reduction Guide, ACLU (Sept. 2022).

used instead of monitoring. If more supervision is required, community-based support programs operated outside of the criminal legal system should be the default provider.

3. ***Individually Tailor Restrictions***. If monitoring is imposed, the rules must be individually tailored and be no more invasive and restrictive than necessary, taking into account the person's housing, job and family obligations, as well as their physical and mental health. One-size-fits-all rules and conditions should be rejected. Courts – not probation departments or sheriff's offices – must determine and impose the rules and conditions governing monitoring.

4. ***Avoid Restraints on Movement and Privacy.*** If imposed, monitoring should allow for freedom of movement and the ability to meet basic daily needs, appointments, and errands without seeking permission or verification. Monitoring should not automatically involve house arrest, search conditions and other invasive restrictions.

5. ***Eliminate Reincarceration for Technical Violations***. Certain technical violations should not be the basis for reincarceration, including temporarily failing to charge the monitoring device or missing a meeting or curfew, for example.

6. ***Scrutinize Monitoring Devices and Limit the Influence of Surveillance Companies***. Ensure oversight, scrutiny, and regulation of the monitoring technology (for reliability and malfunctions) as well as the contracts between the private surveillance companies and public agencies.

7. ***Collect Data.*** Counties should be required to collect data regarding the use of electronic monitoring including the number of people on monitors, basic demographics, the charges against them, the cumulative length of time spent on a monitor, conditions of monitoring, rates of technical violations, whether people are reincarcerated while on a monitor, and any failures to appear.

8. ***Anticipate Changing Technology.*** Any legislative reforms must account for changes in technology and surveillance methods, including cellphone tracking applications, electronic searches of personal devices and other forms of intensive supervision that may not involve a physical ankle monitor.

9. ***Ban Audio Features*****.** Prohibit the use of any monitoring devices that have audio features, such as recording devices, microphones and (or) speakers.

10. ***Presumption of Removal.*** There should be a presumption to remove program-complaint people from monitors after no more than 30 days.

11. ***Articulate Clear Vision.*** California stakeholders, including directly impacted people, should develop a shared vision of the appropriate role (if any) of pretrial electronic monitoring and other forms of intensive supervision methods.

Thank you for the opportunity to share my research and recommendations.

Exhibit B

Hon. J. Richard Couzens (Ret.)

PROCEDURE FOR BAIL SETTING IN ACCORDANCE WITH *IN RE HUMPHREY* (2021) 11 Cal.5th 135

J. RICHARD COUZENS
Judge of the Superior Court
County of Placer (Ret.)

May 2022

TABLE OF CONTENTS

I. INTRODUCTION

The California Supreme Court issued its opinion in *In re Humphrey* (2021) 11 Cal.5th 135 (*Humphrey*), on March 25, 2021. The opinion followed from the granting of review of the Court of Appeal's decision in *In re Humphrey* (2018) 19 Cal.App.5th 1006. Neither party had challenged the Court of Appeal's decision; however, the California Supreme Court granted review on its own motion "to address the constitutionality of money bail as currently used in California as well as the proper role of public and victim safety in making bail determinations." (*Humphrey*, *supra*, 11 Cal.5th at pp. 146-147.)

In re Brown (2022) 76 Cal.App.5th 296 (*Brown*) summarized the California Supreme Court's holding:

> In [*Humphrey*] the Supreme Court held conditioning pretrial release from custody solely on whether an arrestee can afford bail is unconstitutional. When nonmonetary conditions of release would be inadequate to protect public and victim safety and to ensure an arrestee's appearance at trial and a financial condition is necessary, the trial court 'must consider the arrestee's ability to pay the stated amount of bail—and may not effectively detain the arrestee "solely because" the arrestee "lacked the resources" to post bail.' [Citation.] When no option other than refusing pretrial release can reasonably protect the State's compelling interest in victim and community safety, the *Humphrey* Court continued, 'a court must first find by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements.' [Citation.] What the trial court may not do is make continued detention depend on the arrestee's financial condition.
>
> (*Brown*, *supra*, 76 Cal.App.5th at pp. 298-299.)

In 2021, the Legislature enacted Assembly Bill No. 1228 (Stats. 2021-2022, Ch. 533) (AB 1228) which amended Penal Code section 1203.2[1] and added section 1203.25 to establish the circumstances under which persons accused of a violation of probation are entitled to release

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

from custody pending a formal hearing on the violation. The legislation makes available to persons on post-conviction probation supervision many of the procedural protections applicable to pretrial release outlined by the Supreme Court in *Humphrey*.

II. KEY ELEMENTS OF *HUMPHREY*

The following are the key elements of *Humphrey*:

- "*The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional."* (*Humphrey*, *supra*, 11 Cal.5th at p. 143; italics added.) Setting bail beyond the ability of the defendant to pay constitutes a detention.
- Pretrial detention should be rare – release of the defendant should be the normal practice, with detention being the exception. (*Humphrey*, *supra*, 11 Cal.5th at p. 156.)
- "[D]etention is impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests." (*Humphrey, supra,* 11 Cal.5th at pp. 151-152.)
- "When making any bail determination, *a superior court must undertake an individualized consideration of the relevant factors.*" (*Humphrey*, *supra*, 11 Cal.5th at p. 152; italics added.)
- The court first must consider whether nonfinancial conditions will reasonably protect the safety of the public or the victim, and assure future court appearances by the defendant. (*Humphrey*, *supra*, 11 Cal.5th at p. 154.)
- Where the court determines a financial condition, such as cash bail or bail bond, is necessary to secure the state's interests, the court must consider the defendant's ability to pay the amount set. The bail must be set at a level the defendant can reasonably afford. (*Humphrey*, *supra*, 11 Cal.5th at p. 154.)
- *" In order to detain an arrestee . . . , a court must first find by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements*." (*Humphrey*, *supra*, 11 Cal.5th at p. 143; italics added.)
- "An arrestee may not be held in custody pending trial unless the court has made an individualized determination that (1) the arrestee has the financial ability to pay, but nonetheless failed to pay, the amount of bail the court finds reasonably necessary to protect compelling government interests; or (2) detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests. [Citation.]" (*Humphrey*, *supra*, 11 Cal.5th at p. 156.)
- The determination of bail must comply with state statutory and constitutional law and "must also comport with other traditional notions of due process to ensure that when necessary, the arrestee is detained 'in a fair manner.' [Citations.] Among those fair procedures is the court's obligation to set forth the reasons for its decision on the record and to include them in the court's minutes. [Citation.] Such findings facilitate review of the detention order, guard against careless or rote decision-making, and

promote public confidence in the judicial process." (*Humphrey*, *supra*, 11 Cal.5th at pp. 155-156.)

Issues left unresolved by *Humphrey*

There are a number of issues regarding the setting of bail the Supreme Court did not resolve, but instead left "to another day." Such issues include:

- The interplay between California Constitution, article I, sections 12 and 28(f)(3).
- Whether there is a different standard for the detention of a defendant based solely on flight risk – *Humphrey* was based on consideration of public safety and flight risk together. (*Humphrey*, *supra*, 11 Cal.5th at p. 153, fn. 6.)
- How "public safety" is defined.
- The level of risk of future nonappearance that justifies detention.
- The elements of procedural due process for determining detention.
- What conditions of release are considered "reasonable."
- Whether there is an allocated burden of proof in the determination of detention and ability to pay.
- Who is responsible for the cost of conditions imposed by the court.
- Whether the ability to pay includes consideration of the ability to pay an appearance bond premium.

III. PRETRIAL RELEASE OF A DEFENDANT, INCLUDING SETTING OF BAIL

A. Levels of restraint

Humphrey requires the court to approach the question of release by considering increasing levels of restraint. Any conditions of restraint should be in the least amount necessary to secure the state's interest in protection of the public and victim, and to assure the appearance of the defendant in court. (See *Humphrey*, *supra*, 11 Cal.5th at p. 154.)

Brown outlines the sequence of considering the levels of restraint. "The *Humphrey* Court explained a trial court must first determine whether an arrestee is a flight risk or a danger to public or victim safety. If the arrestee does pose one or both of these risks, then the court should consider whether 'nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial.' [Citation.] Although 'no condition of release can entirely *eliminate* the risk that an arrestee may harm some member of the public,' the Court observed, '[t]he experiences of those jurisdictions that have reduced or eliminated financial conditions of release suggest that releasing arrestees under appropriate nonfinancial conditions—such as electronic monitoring, supervision by pretrial services, community housing or shelter, stay-away orders, and drug and alcohol testing and treatment [citations]—may often prove sufficient to protect the community.' [Citation.] [¶] Having considered potential nonfinancial conditions, if the trial court nonetheless concludes money

bail is 'reasonably necessary' to protect the public and ensure the arrestee's presence at trial, then bail must be 'set at a level the arrestee can reasonably afford' unless the court concludes, by clear and convincing evidence, that no nonfinancial condition in conjunction with affordable money bail can reasonably protect public safety or arrestee appearance. [Citation.] Quoting from the United States Supreme Court's decision in *United States v. Salerno* (1987) 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697, the *Humphrey* Court emphasized, 'While due process does not categorically prohibit the government from ordering pretrial detention, it remains true that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." ' [Citation.]" (*Brown*, *supra*, 76 Cal.App.5th at pp. 305-306; italics original.)

Accordingly, the levels of restraint, from the least restrictive to the most restrictive are:

- **Release on the defendant's Own Recognizance (O.R.) without restriction or conditions, where there is little or no risk of flight or to public safety.**

- **Release on the defendant's O.R. with nonfinancial conditions reasonably necessary for the protection of the public and victim, or to secure the defendant's appearance at future court proceedings, where there is some risk to the public or the victim, or of nonappearance.**

- **Payment of monetary bail if reasonably necessary to protect the interests of the state, but at a level the defendant can reasonably afford.**

- **Detention of the defendant if the court concludes that protection of the public or the victim, or future appearance in court cannot be reasonably assured if the defendant is released, if the court finds by clear and convincing evidence that no less restrictive condition of release can reasonably protect the state's interest, and that such detention is consistent with the California constitution and related statutes.**

B. Constitutional and statutory provisions considered with *Humphrey*

1. Right to O.R. (misdemeanor)

Defendants arrested for a misdemeanor are entitled to O.R. release pursuant to section 1270, subdivision (a), "unless the court makes a finding on the record, in accordance with section 1275, that an own recognizance release will compromise public safety or will not reasonably assure the appearance of the defendant as required."

Defendants arrested for a misdemeanor domestic violence-related offense listed in section 1270.1 cannot be released O.R. or on reduced bail without a hearing.

The court is to set bail and any conditions of release. Any bail setting must comply with *Humphrey* unless the court finds grounds for preventive detention.

2. Right to reasonable bail (felony)

Unless there are grounds for detention, a defendant charged with a felony (other than a capital case) is entitled to the setting of non-excessive bail. (Cal. Const., art. I, §§ 12 and 28(f)(3); §§ 1270, subd. (a), 1271.)

3. Serious and violent felonies (§ 1275)

Humphrey applies to serious and violent felonies. As observed in *Brown*: "[T]he [trial] court incorrectly stated *Humphrey* was inapplicable in cases in which the defendant had been charged with a serious or violent felony. Nothing in *Humphrey*'s discussion of the constitutional constraints on the use of money bail suggests that limitation. To the contrary, Humphrey himself was charged with first degree robbery, a serious felony within the meaning of section 1192.7, subdivision (c)(19), and a violent felony within the meaning of section 667.5, subdivision (c)(5). [Citations.]" (*Brown*, *supra*, 76 Cal.App.5th at p. 306.)

Section 1275, subdivision (c), states, "Before a court reduces bail to below the amount established by the bail schedule approved for the county, ... for a person charged with a serious felony, as defined in subdivision (c) of Section 1192.7, or a violent felony, as defined in subdivision (c) of Section 667.5, the court shall make a finding of unusual circumstances and shall set forth those facts on the record."

If the court determines bail is appropriate, *Brown* emphasizes the amount of bail must be set in accordance with *Humphrey*, including consideration of the defendant's ability to pay the amount of bail set by the court. The limits of the court's discretion are not prescribed by the bail schedule. "Under *Humphrey* the amount specified in the bail schedule (or any other amount of bail, for that matter) is appropriate only if the court first determines the arrestee can afford to post it. Otherwise, the Supreme Court explained, 'requiring money bail in a particular amount is likely to operate as the functional equivalent of a pretrial detention order.' [Citation.]" (*Brown*, *supra*, 76 Cal.App.5th at p. 307.)

Accordingly, although the court is required by section 1275, subdivision (c), to find unusual circumstances before reducing bail for a serious or violent offense below schedule, if the court determines the amount of bail the defendant can reasonably afford is below schedule, the court must set bail in accordance with

the constitutional requirements of *Humphrey*, even in the absence of unusual circumstances otherwise required by section 1275, subdivision (c).[2]

4. Verification of proper notice

Prior to setting bail, the court should verify proper notice has been given when required. There are several circumstances where counsel and/or the victim must be given notice of a bail proceeding:

- Where the defendant is charged with a serious felony (Cal. Const., art. I, § 18(f)(3): "Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter.") A prior request for notice is not required.

- Where the victim has requested notice and/or an opportunity to be heard. (Cal. Const., art. I, § 28(b)(8); § 646.93, subd. (b).)

- Written 2-days' notice where bail is to be set either higher or lower than schedule if defendant is charged with a serious or violent felony (except residential burglary), witness intimidation (§ 136.1), spousal rape (§ 262), corporal injury to spouse (§ 273.5), criminal threats (§ 422), stalking (§ 646.9), battery with traumatic condition (§ 273.5), spousal battery (§ 243, subd. (e)(1)), or violation of a domestic violence protective order (§ 273.6). (§§ 1270.1, subd. (a)-(b); 1319, subd. (a).)

- Defendant is charged with a violent felony with a prior failure to appear on a felony matter. (§ 1319, subd. (b).)

If proper notice has not been given, the court should not continue with the bail hearing, but should order a short continuance of not more than five days while notice is given. (See section 1270.2.) Provisional bail should be set pending the full bail hearing held after proper notice is given. Generally, the amount set should not be less than schedule or less than any amount specially set by a judge.

The prosecutor must "make all reasonable efforts" to notify the victim of a bail hearing. (§ 646.93, subd. (b).)

[2] See discussion, *infra*, where the amount of bail the defendant can afford is insufficient to protect the interests of the state.

5. *Humphrey* not applicable to prearraignment procedures

It does not appear likely *Humphrey* applies to any bail setting prior to arraignment. There is nothing in *Humphrey* that suggests the court must make a determination of the defendant's ability to pay when setting bail for the issuance of a warrant, performing on-call magistrate functions under section 1269c, or setting conditions of release as part of a prearraignment release program. Most of these procedures are conducted ex parte without the direct involvement of or appearance by the defendant – there simply is no reasonable opportunity to obtain the necessary information to make the ability to pay determination. Furthermore, bail setting that departs from the scheduled amount without a prior hearing in open court violates section 1270.1 as to its designated crimes.

6. *Humphrey* not directly applicable to post-conviction holds

Nothing in *Humphrey* suggests it applies to persons on post-conviction holds based on a violation of probation, mandatory supervision, PRCS, or parole. The constitutional right to bail applies only prior to trial. There is no right to bail because of a restraint imposed after the finality of a judgment of conviction. (*In re Law* (1973) 10 Cal.3d 21, 25-26.) However, much of the procedure outlined in *Humphrey* has been included in section 1203.25 applicable to persons arrested on probation violations. (See discussion of section 1203.25, *infra*.)

C. Determining risk posed by the defendant

In setting or denying bail, the court must determine the public safety or flight risk posed by the defendant and consider the factors listed in article I, section 28(f)(3), of the California Constitution and sections 1270.1 and 1275:

1. The protection of the public and the danger if the defendant is released; safety of the public shall be the primary consideration.

2. The seriousness of the offense charged, including consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, the alleged use or possession of controlled substances by the defendant, and the potential sentence.

3. In considering domestic violence cases, the court should consider current or past violations of restraining or protective orders, evidence of lethality (*e.g*., strangulation), safety of victim's children or any other person, threats made by defendant to the victim, past violence against a partner, and evidence presented by the prosecutor pursuant to section 273.75, subdivision (a).

4. The previous criminal record of the defendant.

5. The probability of the defendant appearing at trial or at a hearing of the case, including the rate of past appearances.

6. In considering offenses charged under the Health and Safety Code, the court shall consider: (1) the alleged amounts of controlled substances involved in the commission of the offense, and (2) whether the defendant is currently released on bail for an alleged violation of the Health and Safety Code.

The factors to be considered by the court in making an individualized assessment of the defendant's risk as identified by the Supreme Court in *Humphrey* include:

- Protection of the public and the victim
- The seriousness of the charged offense
- The arrestee's previous criminal record
- The arrestee's history of compliance with court orders
- The likelihood that the arrestee will appear at future court proceedings

(*Humphrey*, *supra*, 11 Cal.5th at p. 152.)

A court's determination of risk "should focus . . . on risks to public or victim safety or to the integrity of the judicial process that are reasonably likely to occur." (*Humphrey*, *supra*, 11 Cal.5th at p. 154.)

Proffers of proof: *In re Harris* (2021) 71 Cal.App.5th 1085 (*Harris*) (granted review), rejected the defense argument that the prosecution was required to produce actual admissible evidence in establishing the basis for pretrial detention; rather, the court allowed the parties to proceed by proffers of proof. "[W]e conclude, as a general matter, that proffers of evidence may satisfy section 12(b)'s clear and convincing evidence standard without offending federal or state due process principles. In so concluding, we emphasize that it remains within the discretion of the trial court to decide whether particular instances of proffered evidence may be insufficient, and whether to insist on the production of live testimony or other evidence in compliance with more stringent procedural requirements. [Citations.]" (*Harris*, *supra*, 71 Cal.App.5th at p. 1101; granted review[3].)

[3] In granting review, the Supreme Court limited briefing and argument to "what evidence may a trial court consider at a bail hearing when evaluating whether the facts are evident or the presumption great with respect to a qualifying charged offense and whether there is a substantial likelihood the person's release would result in great bodily harm to others? (Cal. Const. art. I, § 12, subd. (b).)" Pending review, the court allowed the Court of Appeal's decision to be cited "not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, to choose between sides of any such conflict." (*In re Harris*, S272632, order granting review, March 9, 2022.)

Risk assessments: The court likely may consider information generated by a validated actuarial risk assessment tool. The use of such a tool was not addressed in *Humphrey* nor any other California appellate decision to date.

Harris rejected consideration of release data reports from other jurisdictions: "Relying on reports reflecting pretrial release data in other jurisdictions, petitioner . . . appears to contend that as a statistical matter, it is unlikely he will reoffend if released. We are not persuaded. Setting aside the questionable relevance of such data to our review on appeal, giving weight to petitioner's statistical reports seems at odds with *Humphrey*'s holding that bail decisions require 'an individualized consideration of the relevant factors [Citation] and 'careful consideration of the individual arrestee's circumstances.' [Citation.]" (*Harris*, *supra*, 71 Cal.App.5th at pp. 1103-1104 (review granted).) "Statistical reports from other jurisdictions" seem materially distinguishable from validated risk assessments specific to the defendant's circumstances.

Truth of the charges: The court is to assume the truth of the criminal charges. (*Humphrey*, *supra*, 11 Cal.5th at p.153; see also *Harris*, *supra*, 71 Cal.App.5th at p. 1102 (review granted).)

D. Provisional setting of bail and conditions of release

Setting of bail and conditions of release is normally part of the arraignment process and, if possible, should be accomplished at that time. It may be proper to set bail provisionally to allow a reasonable opportunity to assess the defendant's safety and flight risk, the defendant's financial resources, and the availability of less restrictive alternative conditions of release. (See, *e.g.*, *In re Humphrey* (2018) 19 Cal.App.5th 1006, 1044 (granted review) [[Use of a bail schedule may serve] "as a starting point for . . . a court setting bail provisionally in order to allow time for assessment of a defendant's financial resources and less restrictive alternative conditions by the pretrial services agency"].) It is suggested that if a continuance of the bail determination is needed for any reason, that it not be longer than the five days authorized by section 1270.2. A defendant unable to post bail may request "an automatic review" of the amount set by the court at a hearing held not later than five days after the original bail setting. (§ 1270.2; *Humphrey*, *supra*, 11 Cal.5th at p. 155, fn. 8.)

E. Setting conditions of release

The court has authority to impose reasonable conditions on release related to the protection of the public and to assure future court appearances. (*In re Webb* (2019) 7 Cal.5th 270, 278.) The conditions should be the least restrictive needed to address these interests. In accordance with *Humphrey*, such conditions may include, but are not limited to:

- Electronic monitoring
- Regular check-ins with a pretrial case manager
- Community housing or shelter
- Drug and alcohol treatment

(*Humphrey*, *supra*, 11 Cal.5th at p. 154.)

In addition, the court may wish to consider additional restrictions:

- Search and seizure waiver
- Drug testing
- Stay away/no contact orders

Cost of conditions of release

Humphrey did not determine who should pay for the costs incurred in connection with release conditions imposed by the court. It is unlikely the court may require the payment of such costs by the defendant in absence of specific statutory authority. (See Gov. Code, § 70633, subd. (b) ["No fee shall be charged by the clerk for services rendered in any criminal action unless otherwise specifically authorized by law . . . .]; *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 738 [". . . the superior court lacks inherent authority to require the parties to pay the cost of court operations in a criminal action or proceeding, in the absence of an express statutory provision to the contrary."].)[4] Moreover, Senate Bill No. 129 (Stats. 2021, ch. 69), the Budget Act of 2021, has allocated ongoing funding to trial courts and probation departments for pretrial services.

Furthermore, even if permissible, any charge must only be according to the defendant's ability to pay. Imposing the burden to pay for a condition of release beyond the defendant's ability to pay likely is contrary to *Humphrey* because release then is effectively determined by the defendant's financial status, something expressly prohibited by the constitution. (See *Humphrey*, *supra*, 11 Cal.5th at p. 143.)

F. Setting of monetary bail

If after an individualized consideration of the relevant factors the court concludes nonfinancial conditions of release are insufficient to protect the public and the victim and/or assure future court appearances, the court may consider the use of monetary bail. If the court determines monetary bail is reasonably necessary to preserve the state's interests, the court may set bail but "must consider the individual arrestee's ability to pay, along with the seriousness of the charged offense and the arrestee's criminal record, and – unless there is a valid basis for detention – set bail at a level the arrestee can reasonably afford." (*Humphrey*, *supra*, 11 Cal.5th at p. 154.) (See discussion of setting bail beyond the defendant's ability to pay, *infra*.)

Although not discussed in *Humphrey*, likely the consideration of the amount of bail the defendant can afford includes the ability of the defendant to obtain a corporate bond with payment or partial payment of the bond premium.

[4] Assembly Bill No. 2354, currently pending in the Legislature, would prohibit the defendant being charged any fees for pretrial supervision if released on their own recognizance.

1. Determining ability to pay

In determining defendant's ability to pay, the court may take guidance from section 987.8, subdivision (g)(2), for reimbursement of counsel costs in a criminal case: " 'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernable future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernable financial position.... [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant."

Determining ability to pay may be aided by the use of Judicial Council form CR-115.

2. Burden of proof

Humphrey did not assign a burden of proof to the determination of the ability to pay. The court, however, has the duty to inquire into the defendant's financial circumstances and to determine whether restrictions less than detention will reasonably meet the interests of the state.

3. Setting monetary bail according to schedule; findings by the court

The Supreme Court in *Humphrey* did not discuss the appropriate use of bail schedules. The court of appeal decision in *Humphrey* strongly criticized the use of bail schedules, primarily because they set bail for specified crimes without consideration of the individual circumstances of a defendant, including the defendant's ability to pay the amount set. Nevertheless, the opinion acknowledged that bail schedules remain a valid tool in certain circumstances. Bail schedules may properly be used:

(1) To determine the relative seriousness of the current crime and the defendant's criminal record, relevant to the determination of the defendant's dangerousness;

(2) To permit persons to obtain release prior to court involvement by the posting of the scheduled bail;

(3) As a starting point in the determination of the proper bail to be set when the court issues a warrant;

(4) As a starting point "for a court setting bail provisionally in order to allow time for assessment of a defendant's financial resources and less restrictive alternative conditions by the pretrial services agency;" and

(5) To set bail when the defendant does not oppose detention.

(*In re Humphrey* (2018) 19 Cal.App.5th 1006, 1043-1044; review granted.)

It does not appear any of the foregoing uses are in conflict with the Supreme Court's decision in *Humphrey*.

If the crime is listed in section 1270.1, such as a serious or violent felony, and the court sets bail either higher or lower than specified in the bail schedule, the court must state the reasons for the decision on the record. (§ 1270.1, subd. (d).) If the court is adjusting the amount of bail based on ability to pay as required by *Humphrey*, such a reason should be included in the court's statement.

G. Ordering preventive detention

"In those cases where the arrestee poses little or no risk of flight or harm to others, the court may offer OR release with appropriate conditions. [Citation.] Where the record reflects the risk of flight or a risk to public or victim safety, the court should consider whether nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial. If the court concludes that money bail is reasonably necessary, then the court must consider the individual arrestee's ability to pay, along with the seriousness of the charged offense and the arrestee's criminal record, and — unless there is a valid basis for detention — set bail at a level the arrestee can reasonably afford. *And if a court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by clear and convincing evidence, that no nonfinancial condition of release can reasonably protect those interests*." (*Humphrey*, *supra*, 11 Cal.5th at p. 154; italics added.)

"An arrestee may not be held in custody pending trial unless the court has made an individualized determination that (1) the arrestee has the financial ability to pay, but nonetheless failed to pay, the amount of bail the court finds reasonably necessary to protect compelling government interests; or (2) detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests. [Citation.] Pretrial detention on victim and public safety grounds, subject to specific and reliable constitutional constraints, is a key element of our criminal justice system. Conditioning such detention on the arrestee's financial resources, without ever assessing whether a defendant can meet those conditions or whether the state's interests could be met by less restrictive alternatives, is not." (*Humphrey*, *supra*, 11 Cal.5th at p. 156.)

1. Detention where amount defendant can pay is insufficient to meet state's interests

"[U]nder *Humphrey*, if the court properly determines nonfinancial conditions are insufficient to protect the state's interests, but that imposing a money bail condition (alone or in combination with nonfinancial conditions) would adequately protect the public and the victims and ensure the arrestee's presence in court, the court must consider the individual arrestee's ability to pay and 'set bail at a level the arrestee can reasonably afford.' [Citation.] *If money bail set at that level is not sufficient to protect the state's compelling interests, then the trial court's only option is to order pretrial detention, assuming the evidentiary record is sufficient to support the findings necessary to justify such an order*." (*Brown*, *supra*, 76 Cal.App.5th at p. 308; italics added.) Accordingly, if after the court makes an individualized determination of the risk factors identified by *Humphrey* and the defendant's ability to pay, the court determines the defendant is only able to pay for monetary bail in an amount insufficient to protect the state's interests, the court may detain the defendant after making the findings required by *Humphrey*, if supported by the record.

2. Setting bail in amount defendant cannot afford

The court may not intentionally set bail out of the reach of the defendant's ability to pay to accomplish preventive detention. Such an improper practice was directly addressed in *Brown*: "It may well be, as the district attorney argues, that 'there was no alternative to cash bail' and 'nothing short of detention can suffice' in this case. The Supreme Court in *Humphrey* recognized such cases exist. [Citation.] Although it declined to address in detail the constitutional requirements for such a no-bail order, the fundamental constitutional principles the Court enunciated clearly mean that setting bail at an amount the court knows cannot be met, as here, is not the appropriate response in those situations. Rather, *the trial court must be explicit that it is ordering pretrial detention and base its order on findings that 'detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests.'* [Citation.]" (*Brown*, *supra*, 76 Cal.App.5th at p. 308; italics added.) "[I]f the court finds by clear and convincing evidence that there are no less restrictive means to [protect the public and the victim and ensure future court appearances], then it may enter a no-bail order. The court's findings and reasons for any such order must be stated on the record and included in a written order. [Citation.]" (*Brown*, *supra*, 76 Cal.App.5th at p. 309.)

In setting any amount of bail, the court has determined the defendant is suitable for release and bail must be set in an amount the defendant can reasonably

afford; otherwise, the defendant should be detained under the standards set by *Humphrey*.[5] The proper order is "no bail."

3. Making findings and entering them in the minutes

If the court concludes detention of the defendant is required, the reasons for the court's decision must be set forth on the record and entered in the minutes. "A court's procedures for entering an order resulting in pretrial detention must also comport with other traditional notions of due process to ensure that when necessary, the arrestee is detained 'in a fair manner.' [Citations.] *Among those fair procedures is the court's obligation to set forth the reasons for its decision on the record and to include them in the court's minutes.* [Citation.] Such findings facilitate review of the detention order, guard against careless or rote decision-making, and promote public confidence in the judicial process. [Citations.]" (*Humphrey*, *supra*, 11 Cal.5th at p. 155; italics added.)

The failure to make and record appropriate findings is grounds for reversal of the detention order. The court's statement should include the justification for the detention and address why lesser forms of restraint would not satisfy the interests of the state. *Brown* discussed the failure of the trial court to establish an appropriate record. "Here, there was no evidence proffered in the trial court to support the contention that harm to the public was reasonably likely to occur if Brown were released. The trial court failed to address any of the specific nonfinancial conditions proposed by Brown or to indicate, even in general, why nonfinancial conditions of release (such as a stay away or no contact order, home detention, electronic monitoring or surrender of Brown's Class A driver's license) would be insufficient to protect the victims or the public or obviate the risk of flight. On this record we cannot conclude there was sufficient evidence to support a finding by clear and convincing evidence that less restrictive alternatives to detention could not reasonably protect the public or victim safety." (*Brown*, *supra*, 76 Cal.App.5th at p. 307.)

In re Harris (2021) 71 Cal.App.5th 1085 (*Harris*) (granted review), also addressed the consequences of a court's failure to establish a proper record for detention. *Harris* first rejected the argument that the correctness of the court's decision could be implied from a silent record. "[E]ven though the general presumptions in favor of a judgment or order might otherwise support a finding made *sub silentio*, *Humphrey* specifically requires, as a matter of procedural due process,

[5] The Court of Appeal in *In re Humphrey* (2018) 19 Cal.App.5th 1006, 1037 (review granted), suggested the court, in certain circumstances, may set bail higher than the defendant can afford: "If the court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose." The concept appears in conflict with *Humphrey* and *Brown*.

that a court entering a pretrial detention order set forth 'the reasons for its decision on the record and to include them in the court's minutes.' [Citation.] Thus, the reasons supporting a denial of bail cannot be implied." (*Harris*, *supra*, 71 Cal.App.5th at pp. 1104-1105; review granted.)

Harris then addressed the lack of findings with respect to lesser forms of restraint. "Here, the trial court found, by clear and convincing evidence, a substantial likelihood that petitioner's release would result in great bodily harm to others, and it identified its reasons supporting that finding. *But the court did not actually address any less restrictive alternatives to pretrial detention and did not articulate its analytical process as to why such alternatives could not reasonably protect the government's interests.* And while overlapping reasons may exist for making the applicable findings under section 12(b) and *Humphrey*, the court's failure to articulate its evaluative process requires that we speculate as to why the court believed that no nonfinancial conditions could reasonably protect the interests in public or victim safety. As such, the record here does not permit meaningful appellate review. ([Citation] ['meaningful judicial review is often impossible unless the reviewing court is apprised of the reasons behind a given decision'].)" (*Harris*, *supra*, 71 Cal.App.5th at p. 1105; italics added; footnote omitted; granted review.)

H. Appellate review of custody status

The court's decision on the custody status of the defendant is reviewable on appeal under the abuse of discretion standard. " '[W]e review a trial court's ultimate decision to deny bail for abuse of discretion. [Citations.] Under this standard, a trial court's factual findings are reviewed for substantial evidence, and its conclusions of law are reviewed de novo. [Citation.] An abuse of discretion occurs when the trial court, for example, is unaware of its discretion, fails to consider a relevant factor that deserves significant weight, gives significant weight to an irrelevant or impermissible factor, or makes a decision so arbitrary or irrational that no reasonable person could agree with it.' [Citation.] We apply the same abuse of discretion standard to review the superior court's decision to increase or reduce bail. [Citations.]" (*Brown*, *supra*, 76 Cal.App.5th at p. 302.) Generally in accord with *Brown* on this issue is *In re Harris* (2021) 71 Cal.App.5th 1085, 1101-1102) (granted review). *Brown* is based on a petition for writ of mandate; *Harris* is based on a petition for writ of habeas corpus.

IV. PREVENTIVE DETENTION: PROVISIONS OF THE CALIFORNIA CONSTITUTION

Since the Supreme Court did not discuss the interplay between California Constitution, article I, sections 12 and 28(f)(3), trial courts must consider the potential application of both constitutional provisions. Article I, section 12 specifies a person "shall be released on bail by sufficient sureties," except in designated circumstances. Article I, section 28(f)(3) specifies "a person may be released on bail by sufficient sureties," except in designated circumstances. *Humphrey* makes clear that pretrial detention must conform to existing constitutional and

statutory requirements. "Even when a bail determination complies with the [stated] prerequisites, the court must still consider whether the deprivation of liberty caused by an order of pretrial detention is consistent with state statutory and constitutional law specifically addressing bail — a question not resolved here —and with due process." (*Humphrey*, *supra*, 11 Cal.5th at p. 155.) Accordingly, pretrial detention of the defendant must be authorized under at least one of the following provisions of the California constitution.

A. Whether crime is listed in article I, section 12 - authorizing denial of bail

Article I, section 12 specifies "[a] person shall be released on bail by sufficient sureties, except for:"

1. Capital crimes where "the facts are evident or the presumption great" that the defendant committed the offense. (Cal. Const., art. I, § 12(a).) This phrase requires "evidence that would be sufficient to sustain a hypothetical verdict of guilt on appeal." (*In re White* (2020) 9 Cal.5th 455, 463 (*White*).)

2. Felony offenses involving acts of violence on another person or felony sexual assault, where "the facts are evident or the presumption great" that the defendant committed the offense and the court finds by clear and convincing evidence that there is a substantial likelihood defendant's release would result in great bodily injury to others. (Cal. Const., art. I, § 12(b).) A finding of "substantial likelihood" is subject to review under a substantial evidence standard. (*White*, *supra*, 9 Cal.5th at p. 467.) "Clear and convincing evidence" means a showing that there is a "high probability" that the fact or charge is true. (*Ibid*.)

3. Felony offenses where "the facts are evident or the presumption great" that the defendant committed the offense and court finds by clear and convincing evidence that the defendant threatened another with great bodily injury and there is a substantial likelihood the defendant would carry out the threat if released. (Cal. Const., art. I, § 12(c).)

4. Even if the defendant meets the requirements noted above, the court, in its discretion, may grant bail or release the defendant on their O.R. (*White*, *supra*, 9 Cal.5th at p. 469.)

B. Whether the defendant is a danger to the public or victim under article I, section 28(f)(3)

Article I, section 28 provides a potential alternative means of preventive detention from that of article I, section 12. A finding under the factors listed in section 28(f)(3), together with a consideration of the factors listed in sections 1270.1 and 1275, may permit the court to enter an order holding a person without bail if the court also finds "the facts are evident or the presumption great" that the defendant committed the qualified offense and by clear and

convincing evidence that no lesser condition or combination of conditions of restraint will reasonably assure the safety of the public or the victim, and/or the appearance of the defendant in court.

"In *setting, reducing or denying bail*, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. *Public safety and the safety of the victim shall be the primary consideration*." (Cal. Const., art. I, §§ 12 and 28(f)(3); italics added.)

"[A]n order of detention requires an interest that 'is sufficiently weighty' in the given case – and courts should likewise bear in mind that [*United States v. Salerno* (1987) 481 U.S. 739,] upheld a scheme whose scope was 'narrowly focuse[d] on a particularly acute problem.'" (*Humphrey*, *supra*, 11 Cal.5th at p. 155.) Pretrial detention should be limited to the most serious of crimes. (*Ibid*.)

C. Whether the defendant is a flight risk under article I, section 28(f)(3)

Humphrey did not discuss the ability to detain based solely on flight risk, without consideration of dangerousness. However, the opinion repeatedly referenced public safety *or* flight risk in discussion preventive detention. Where there was an opportunity, the court applied the same standards to both types of risk. (See, e.g., *Humphrey*, *supra*, 11 Cal.5th at p. 153.) Accordingly, it is reasonable to assume the court will not impose a *lesser* standard for detention based solely on flight risk. Courts generally distinguish between the risk a defendant poses of intentional flight and factors, such as transportation issues, homelessness or employment, that may result in a temporary failure to appear.

D. Application of *Humphrey* to release decisions under the California constitution

Although *Humphrey* declined to consider the relationship between its opinion and article I, sections 12 and 28(f)(3) of the California Constitution, *In re Harris* (2021) 71 Cal.App.5th 1085 (Harris)(review granted), concluded the decision applied to decisions governed by article I, section 12. "Although *Humphrey* involved a claim of excessive bail and not a denial of bail under section 12(b) as here, the generality with which *Humphrey* laid out the foregoing requirement—without resolving whether section 12 and section 28, subdivision (f)(3) of article I of the California Constitution 'can or should be reconciled' [citation]—reasonably indicates the Supreme Court's contemplation that its holding applies to all orders for pretrial detention under section 12(b). [Citation.]" (*Harris*, *supra*, 71 Cal.App.5th at page 1096; footnote omitted; granted review.) Based on the same reasoning, likely *Humphrey* also applies to decisions under article I, section 28(f)(3). Accordingly, even though the defendant may be denied bail under a provision of the constitution, additional findings required by *Humphrey* should also be made, at least until the relationship between *Humphrey* and the constitution is more fully resolved.

V. PREHEARING RELEASE OF PROBATIONERS

A. Introduction

Assembly Bill No. 1228 (Stats. 2021-2022, Ch. 533) (AB 1228) amended section 1203.2 and added section 1203.25 to establish the circumstances under which persons accused of a violation of probation are entitled to release from custody pending a formal hearing on the violation. The legislation makes available to persons on post-conviction probation supervision many of the procedural protections applicable to pretrial release outlined by the California Supreme Court in *In re Humphrey* (2021) 11 Cal.5th 135 (*Humphrey*). The legislation first amended section 1203.2, dealing with many forms of post-conviction supervision, to direct the court to a new statute when considering the custody status of persons on probation supervision. The legislation next enacted section 1203.25 dealing with the custody status of persons charged with a probation violation.

B. Effective Date

AB 1228 became effective on January 1, 2022. The new rules governing the custody status of probationers apply to all persons arrested on an alleged probation violation after that date. Because the custody status of an individual is continuing in nature and always subject to modification by the court, the new provisions also apply to persons being held on probation violations prior to January 1, 2022. Persons in custody who are pending a revocation of probation as of January 1, 2022, likely will be entitled to a review of their custody status based on the enactment of AB 1228.

C. AB 1228 is limited to probationers

It is clear from the plain language of AB 1228 that its provisions are limited to persons held on a probation violation. Many of the provisions of section 1203.2 apply to other forms of post-conviction supervision, including mandatory supervision, postrelease community supervision (PRCS), and parole. (§ 1203.2, subd. (a).) The statute now provides: "[W]henever a *person on probation* who is subject to this section is arrested, with or without a warrant or the filing of a petition for revocation as described in subdivision (b), the court shall consider the release of a *person on probation* from custody in accordance with Section 1203.25." (Italics added.) Section 1203.2, subdivision (a), directs the court to section 1203.25 when considering release of *probationers* arrested on an alleged violation. Section 1203.25 is replete with references to *persons on probation*, not other forms of post-conviction supervision. In short, nothing in sections 1203.2 or 1203.25 offers any suggestion the provisions of AB 1228 will apply to any persons on post-conviction supervision other than probation.[6]

[6] If the defendant is on probation for one case and another form of supervision for another case, likely the process for dealing with prehearing release will be treated separately for each form of supervision.

It is unlikely there is any serious equal protection concern if the new provisions are inapplicable to other forms of post-conviction supervision. Persons who are placed on probation generally are considered at the low end of risk of future criminal conduct. Persons on mandatory supervision, postrelease community supervision, and parole, however, have been determined to be unsuitable for release on probation due to factors related to the underlying criminal offense or the defendant's criminal record. There appears to be a rational basis for distinguishing between persons on probation and persons under supervision where probation has been denied.

D. Procedure effective at arraignment

The new procedures are effective when the probationer has been "arrested, with or without a warrant or the filing of a petition for revocation" of probation. (§ 1203.2, subd. (a).)

The new procedure is applicable to the arraignment proceeding and thereafter, but prior to the formal probation violation hearing. Section 1203.25, subdivision (a), begins: "All persons released by a court *at or after the initial hearing and prior to a formal probation violation hearing* pursuant to subdivision (a) of Section 1203.2 . . . ." (Italics added.) It is clear the statute is addressing release by the court at or after the initial appearance, *i.e*., the arraignment. The new procedures do not govern the discretion of the police officer, probation officer, or custody facility to make traditional release or detention decisions. However, nothing in the legislation would prohibit a court from considering the factors as part of a pretrial release program if authorized by the court.

Persons serving flash incarceration at time of arraignment

The new procedures are inapplicable to probationers who are serving a period of flash incarceration at the time of the arraignment or subsequent hearing on release. Section 1203.2, subdivision (a), only requires consideration of section 1203.25 if the person is not "otherwise serving a period of flash incarceration." Presumably, once the period of flash incarceration has been served, the person would then be eligible for the court to consider release under the provisions of section 1203.25.

E. Presumption of release prior to hearing

Section 1203.25 establishes a presumption for prehearing release of persons accused of a probation violation. The nature of the presumption will depend on whether the underlying criminal offense is a felony or misdemeanor. Section 1203.25, subdivision (a) provides: "All persons released by a court at or after the initial hearing and prior to a formal probation violation hearing pursuant to subdivision (a) of Section 1203.2 shall be released on their own recognizance unless the court finds, by clear and convincing evidence, that the particular circumstances of the case require the imposition of an order to provide reasonable protection to the public and reasonable assurance of the person's future appearance in court."

1. Misdemeanor cases

Section 1203.25, subdivision (d), provides that a defendant charged with a violation of misdemeanor probation must be released unless the person has violated a court order. As stated in subdivision (d): "The court shall not deny release for a person on probation for misdemeanor conduct before the court holds a formal probation revocation hearing, unless the person fails to comply with an order of the court, including an order to appear in court in the underlying case, in which case subdivision (a) shall apply."

Subdivision (d) directs the release of "a person on probation for misdemeanor conduct." The phrase is grammatically ambiguous. The phrase could mean that its provisions apply to persons on probation for an *underlying misdemeanor offense*; or the statute could mean that the *violation* was new misdemeanor conduct. The context of the provision suggests the former interpretation – section 1203.25, subdivision (d), applies when the underlying criminal offense is a misdemeanor.

Unless an exception applies, subdivision (d) specifies the "court shall not deny release" for a person on misdemeanor probation. The statute allows imposition of conditions under certain circumstances. Whether it is appropriate to impose conditions of release will depend on the application of section 1203.25, subdivision (a), discussed, *infra*.

Subdivision (d) provides an exception to the presumption of release where "the person fails to comply with an order of the court, including an order to appear in court in the underlying case . . . ." Likely subdivision (d) refers to violations of orders made by the court to protect the public and assure future court appearances by the defendant. Accordingly, if the court has directed the defendant to appear and the defendant thereafter fails to appear in court, or the court has issued a criminal protective order and the defendant violates the order, the court may proceed under the provisions of section 1203.25, subdivision (a), in issuing further orders. (See discussion of additional orders, *infra*.) Likely this language is not intended to include violation of the general conditions of probation – to apply subdivision (d) in such a broad manner would have the exception completely swallowing the rule.

Likely it is the intent of the legislation that the failure to observe a court order would be based on a violation of an order entered in the case at issue, not a reference to past failures to observe orders entered in unrelated cases. Presumably every probationer will be entitled to release without conditions until there is the first violation in the case.

If the court intends to preserve the ability to impose additional conditions of release or to place the defendant on a "no bail" status for violation of a court order, the court must be clear in stating the defendant's required conduct. For example, the court must order the defendant to appear at the next proceeding or at least enter an order at the beginning of the proceedings that the defendant must personally appear at all future court dates unless expressly excused by the court or counsel. A best practice would be to have the court release the defendant on a formal signed release agreement pursuant to section 1318. Such a release agreement should order the defendant to appear as directed, obey all laws and orders of the court, and not leave the state without permission of the court. The minutes should indicate the entry of the order in open court with the defendant present.

Section 1203.25 does not distinguish between formal or informal grants of probation. Nothing in the new statute suggests there is any difference between the two forms of supervision.

Order of preventive detention without a violation of a court order

It is not clear whether the court has the authority to enter an order of preventive detention (or setting "no bail") in a misdemeanor case without the defendant having first violated a court order. The plain meaning of section 1203.25, subdivision (d), is that such a violation must occur before the defendant can be detained. Such an interpretation means the court can never detain a person on a violation of misdemeanor probation at the initial arraignment on the violation.[7]

It is an open question whether the provisions of California Constitution, article I, sections 12 and 28(f)(3), apply to post-conviction release decisions. Section 28, subdivision (f)(3), for example provides, in part, that "[i]n setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations." If section 1203.25, subdivision (d), is applied as its plain meaning would suggest, it would preclude the court from considering the factors required by the constitution – something the Legislature may not direct given the constitutional mandate.

The ultimate question, however, is whether the constitutional provisions governing bail have any application to post-conviction release proceedings. *In re Podesto* (1976) 15 Cal.3d 921, 929-930, for example, held that the constitutional

[7] If the violation is based on a new crime, nothing in section 1203.25 prevents the court from ordering preventive detention for the new crime, assuming the required showing is made. (See § 1203.25, subd. (g), discussed, *infra*.)

provisions on bail apply only to persons who have not yet been convicted. Does the fact that the Legislature is now imposing rules that parallel pre-conviction rules on post-conviction defendants trigger a full consideration of the factors outlined in the constitution? This issue may only be resolved after further appellate review.

2. Felony cases

Section 1203.25, subdivision (e), provides a defendant charged with a violation of felony probation must be released unless the court makes a finding by clear and convincing evidence that there are no "reasonably available" means to provide "reasonable" protection of the public and "reasonably" assure the defendant will make future court appearances. As stated in subdivision (e): "The court shall not deny release for a person on probation for felony conduct before the court holds a formal probation revocation hearing unless the court finds by clear and convincing evidence that there are no means reasonably available to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court." The requirement of "clear and convincing evidence" and no reasonable alternative to a denial of pre-hearing release is consistent with the *Humphrey* decision. (See, *e.g*., *Humphrey*, *supra*, 11 Cal.5th at p. 153.)

Section 1203.25, subdivision (e), clearly contemplates the possibility of preventive detention for a violation of felony probation if there is a showing, by clear and convincing evidence, there are no means reasonably available to offer reasonable protection of the public and assure the defendant's further court appearances. To make such a finding, the court will be required to consider the alternatives to custody suggested in section 1203.25, subdivision (b), discussed, *infra*, and cash bail authorized in section 1203.25, subdivision (c), discussed, *infra*.

Unlike for persons on misdemeanor probation under section 1203.25, subdivision (d), section 1203.25, subdivision (e), does not expressly direct the court to consideration of section 1203.25, subdivision (a), if further orders are necessary. Such a directive, however, is implied from the structure of the statute. Subdivision (e) provides the overarching rule for release of persons on felony probation. Subdivisions (a) and following provide the exceptions to the general rule and the procedural mechanics of implementing the new provisions. If justified by a finding of clear and convincing evidence, the court will be permitted to impose conditions of release or preventive detention for persons on felony probation as authorized by section 1203.25, subdivisions (a) and (e), and other relevant authority.

Application of California Constitution, art. I, section 28, subdivision (f)(3) to determination of custody status

As noted above, it is clear that section 1203.25 permits preventive detention for a person charged with a violation of felony probation. The detention order is permitted if there is clear and convincing evidence that other means of monitoring the defendant will not be sufficient to protect the public or assure future court appearances. What is not clear is whether the provisions of California Constitution, article I, section 12 and section 28, subdivision (f)(3), require additional factors to consider in making the release decision. Section 28, subdivision (f)(3), for example provides, in part, that "[i]n setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations." If section 1203.25, subdivision (e), is applied as its plain meaning would suggest, it would preclude the court from considering the factors required by the constitution – something the Legislature may not direct given the constitutional mandate.

The ultimate question, however, is whether the provisions of the constitution governing bail have any application to post-conviction release proceedings. *In re Podesto* (1976) 15 Cal.3d 921, 929-930, for example, held that the constitutional provisions on bail apply only to persons who have not yet been convicted. Does the fact that the Legislature is now imposing rules that parallel pre-conviction rules on post-conviction defendants trigger a full consideration of the factors outlined in the constitution? This issue may only be resolved after further appellate review.

F. Conditions of release

The rules governing the imposition of conditions of release on a probationer begin with section 1203.25, subdivision (a). The presumption is that persons released prior to a hearing on a misdemeanor or felony violation of probation will be released on their own recognizance. "All persons released by a court at or after the initial hearing and prior to a formal probation violation hearing pursuant to subdivision (a) of Section 1203.2 *shall be released on their own recognizance . . .* " (§ 1203.25, subd. (a); italics added.) It appears the intent of the legislation is to require release on a person's own recognizance *without any additional conditions*.[8] If the

[8] A floor analysis done by the Legislature summarized the legislation: "[AB 1228] specifies that persons released from custody prior to a probation violation hearing shall be released on their own recognizance unless the court finds, by clear and convincing evidence, that the particular circumstances of the case require imposition of *conditions of release* in order to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court." (Assembly Floor Analysis – Concurrence in Senate Amendments, AB 1228 (Lee) As Amended September 3, 2021, page 1; italics added.)

court desires additional conditions of release, the court must find "by clear and convincing evidence, that the particular circumstances of the case require the imposition of an order to provide reasonable protection to the public and reasonable assurance of the person's future appearance in court." (*Ibid*.)

1. Entry of an order by the court

If the requisite showing is made, the court may enter "an order" to provide reasonable protection of the public and assure the defendant's appearance in court. The phrase "an order" is not specifically defined. Presumably it means the court may enter any order, consistent with the provisions of section 1203.25, that will reasonably meet the interests of the state in protecting the public and assuring future court appearances. Such conditions might include electronic monitoring, telephonic reporting and similar conditions listed in section 1203.25, subdivision (b), discussed, *infra*. Such an order also could include preventive detention, if warranted by the circumstances of the case; preventive detention orders are also limited by the provisions of subdivision (d) for defendants on misdemeanor probation, and by subdivision (e) for defendants on felony probation.

"The court shall make an *individualized determination* of the factors that do or do not indicate that the person would be a danger to the public if released pending a formal revocation hearing. Any finding of danger to the public must be based on clear and convincing evidence." (§ 1203.25, subd. (a)(1); italics added.) The requirement of an individualized determination is in accordance with *Humphrey*. (See *Humphrey*, *supra*, 11 Cal.5th at p. 156.)

Section 1203.25, subdivision (a)(1), only requires the individualized determination of the defendant's risk to the public; no mention is made of the risk of failure to appear. Likely this is a legislative oversight. If the court is considering the risk of non-appearance, the court should make an "individualized determination" of the factors that do or do not make the defendant a flight risk.

2. The court's decision

The findings by the court on the factors related to risk to the public and risk of flight must be made by clear and convincing evidence. (§ 1203.25, subd. (a)(1) and (f).) The requirement is consistent with *Humphrey*. (See *Humphrey*, *supra*, 11 Cal.5th at p. 156.) Although it is not clear from the statute, it appears the intent of the Legislature to require findings in justification for the entry of any order imposing conditions on release. Certainly, such findings are required for an order of detention.

Evidence considered by the court

The court's decision must be based on all the evidence presented, including any probation report. (§ 1203.25, sub. (f).) Presumably the probation report could include information provided by the probation department in the petition for revocation or orally or in writing by the probation officer at arraignment on the petition.

It is likely permissible for the court to consider traditional sources of information about the defendant and the violation, including offers of proof and argument of counsel. Certainly, the defense, the prosecution, and the court desire an efficient means of conveying relevant information to the court during the arraignment – traditionally an informal and summary proceeding.

See, *e.g.*, *In re Harris* (2021) 71 Cal.App.5th 1085 (*Harris*) (granted review), in the context of pretrial release. *Harris* rejected the defense argument that the prosecution was required to produce actual admissible evidence in establishing the basis for pretrial detention; rather, the court allowed the parties to proceed by proffers of proof. "[W]e conclude, as a general matter, that proffers of evidence may satisfy section 12(b)'s clear and convincing evidence standard without offending federal or state due process principles. In so concluding, we emphasize that it remains within the discretion of the trial court to decide whether particular instances of proffered evidence may be insufficient, and whether to insist on the production of live testimony or other evidence in compliance with more stringent procedural requirements. [Citations.]" (*Harris*, *supra*, 71 Cal.App.5th at p. 1101; granted review[9].)

Although not required by section 1203.25, either party could call live witnesses on the issue of the defendant's release.

In accordance with *Humphrey*, likely the court should assume the truth of the alleged violation of probation. (See *Humphrey*, *supra*, 11 Cal.5th at p. 153.)

"The court shall not require the use of any algorithm-based risk assessment tool in setting conditions of release." (§ 1203.25, subd. (a)(2).) While the court likely may not use a risk assessment tool in determining the type of supervision it should order, it is not clear whether the court may nevertheless use a risk assessment tool in determining the *suitability* of the defendant for release.

[9] See footnote 3, *supra*.

Determining risk[10]

In determining the circumstances of the defendant's release, the court must determine the public safety and flight risk posed by the defendant. The court likely may consider the factors listed in article I, section 28(f)(3), of the constitution and sections 1270.1 and 1275:

- The protection of the public and the danger to the public if the defendant is released, or released with or without conditions; safety of the public shall be the primary consideration.

- The seriousness of the offense charged, including consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the violation charged, the alleged use of a firearm or other deadly weapon in the commission of the violation charged, the alleged use or possession of controlled substances by the defendant, and the potential sentence.

- In considering domestic violence cases, current or past violations of restraining or protective orders, evidence of lethality (e.g., strangulation), safety of victim's children or any other person, threats made by defendant to the victim, past violence against a partner, and evidence presented by the prosecutor pursuant to section 273.75, subdivision (a).

- The previous criminal record of the defendant.

- The probability of the defendant appearing at the violation hearing, including the record of past appearances.

- In considering offenses charged under the Health and Safety Code, the court should consider: (1) the alleged amounts of controlled substances involved in the commission of the offense, and (2) whether the defendant is currently released on bail for an alleged violation of the Health and Safety Code.

Humphrey stated some of the factors to be considered by the court in making an individualized assessment of the defendant's risk of failure on pretrial release. These include:

[10] The risk factors are taken from authorities discussing the right to pretrial release. It has long been held the California constitutional provisions regarding the right to bail apply only to persons who have not been convicted of a criminal offense. (See, *e.g., In re Podesto* (1976) 15 Cal.3d 921, 929-930.) Because AB 1228 has incorporated many of the procedural protections articulated in *Humphrey*, a decision relating to pretrial release, courts may find it appropriate to consider pre-conviction risk factors when addressing post-conviction release in the context of an alleged violation of probation.

- Protection of the public as well as the victim
- The seriousness of the charged offense
- The arrestee's previous criminal record
- The arrestee's history of compliance with court orders
- The likelihood that the arrestee will appear at future court proceedings

(*Humphrey*, *supra*, 11 Cal.5th at p. 152.)

A court's determination of risk "should focus . . . on risks to public or victim safety or to the integrity of the judicial process that are reasonably likely to occur." (*Humphrey*, *supra*, 11 Cal.5th at p. 154.)

Findings by the court

The court's findings must be made on the record. Subdivision (f) specifies the findings must be made "orally on the record." Undoubtedly it would not be reversible error for the court to enter its reasons in writing on the record. The court's reasons must be entered in the minutes if there is no court reporter and one of the parties requests it. (*Ibid*.) It is not clear whether entry in the minutes can be required if the proceedings are being electronically recorded.

3. Conditions of release

Section 1203.25, subdivision (b), specifies "[r]easonable conditions of release may include, but are not limited to, reporting telephonically to a probation officer[11], protective orders, a global positioning system (GPS) monitoring device or other electronic monitoring, or an alcohol use detection device." The list of supervision options in section 1203.25, subdivision (b), is expressly non-exclusive. In any event, "[t]he court shall impose the least restrictive conditions of release necessary to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court." (§ 1203.25, subd. (a)(3).)

[11] Earlier versions of AB 1228 specified telephonic reporting to a "court services officer." The change undoubtedly was made because supervision of a defendant on probation naturally falls first to the probation officer. However, if a court has a pretrial services program that will be used to monitor persons on prehearing release on a violation of probation, there is no reason why the court could not order reporting to the program.

Cost of conditions of release

Subdivision (b) provides "[t]he person shall not be required to bear the expense of any conditions of release ordered by the court." The legislation does not require the court or county to provide any of the means of supervision, only that if such tools are used, regardless of the defendant's ability to pay, the government must assume the cost. The lack of specific tools of supervision may limit the alternatives to custody available to the court. The legislation does not parse the duty to cover the costs between the court, the county, or the state.

4. Ordering bail

AB 1228 singles out "bail" for special consideration by the court. "Bail shall not be imposed unless the court finds by clear and convincing evidence that other reasonable conditions of release are not adequate to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court." (§ 1203.25, subd. (c)(1).)

The legislation defines "bail" as "cash bail." The measure of cash bail is consistent with the considerations discussed in *Humphrey*. (See *Humphrey*, *supra*, 11 Cal.5th at p. 156.) "*'Bail' as used in this section is defined as cash bail*. A bail bond or property bond is not bail. In determining the amount of bail, the court shall make an individualized determination based on the particular circumstances of the case, and it shall consider the person's ability to pay cash bail, not a bail bond or property bond. Bail shall be set at a level the person can reasonably afford." (§ 1203.25, subd. (c)(2); italics added.)

While the amount of bail must be based on consideration of the defendant's ability to pay cash bail rather than the premium for a bail bond, nothing in AB 1228 prohibits the defendant from posting a bail bond for the amount set by the court. "The officer in charge of [a custody facility and other designated persons] may approve and accept bail in the amount fixed by . . . [the] order admitting to bail *in cash or surety bond* . . . ." (§ 1269b, subd. (a); italics added.) "Upon posting bail, the defendant or arrested person shall be discharged from custody as to the offenses on which bail is posted." (§ 1269b, subd. (g).)

"Ability to pay" is not defined in the statute. Although *Humphrey* requires the court to consider the defendant's ability to pay in setting the amount of bail, the decision also did not establish a definition of "ability to pay." In determining defendant's ability to pay, the court may take guidance from section 987.8, subdivision (g)(2), for reimbursement of counsel costs in criminal cases:
" 'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her,

and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernable future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernable financial position.... [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant."

Determining ability to pay may be aided by the use of Judicial Council form CR-115.

Section 1203.25 does not assign a burden of proof to the determination of the ability to pay. The court, however, has the duty to inquire into the defendant's financial circumstances and to determine the lowest level of restrictions that will reasonably meet the interests of the state.

G. New charges

"If a new charge is the basis for a probation violation, nothing in this section shall be construed to limit the court's authority to hold, release, limit release, or impose conditions of release for that charge as permitted by applicable law." (§ 1203.25, subd. (g).)

AB 1228 permits the court to independently consider the circumstances of release on new charges which may also be the basis of a probation violation. The rules governing the release of the defendant on the probation violation do not change because the violation happens to be the commission of a new crime. Section 1203.25 merely provides that the court will not be *constrained* by its provisions in determining the circumstances of release for the new crime.

It is at least theoretically possible for a defendant to be entitled to release on a violation of probation but be held in custody on the new crime. The court and counsel must be alert to the possibility of this circumstance which could inadvertently deprive the defendant of custody credit on the probation violation. If the defendant is detained on the new crime but released on the violation of probation based on the new crime, the defendant may be deprived of credit in the probation case. If the defendant is otherwise being detained on the new charge, defense counsel should stipulate to at least nominal bail in the probation case to potentially assure the entitlement to presentence custody credit in both cases.

APPENDIX I: CHECKLIST FOR *HUMPHREY* ORDERS

I. RELEASE WITH CONDITIONS: If the court is considering release with conditions

(A) Verify proper notice of bail review has been given the victim(s).

(B) Consider ordering provisional bail and granting a short continuance of bail setting pending review of release options and defendant's financial circumstances.

(C) After consideration of the factors listed in California Constitution, art. I, § 28(f)(3) and §§ 1270.1 and 1275, determine whether the defendant is safe to release on own recognizance (O.R.) with or without conditions.

(D) If defendant is safe to release with conditions, impose the least restrictive conditions that will adequately protect the public and the victim, and assure future court appearances. The court has authority to impose reasonable conditions of release related to future criminality. (*In re Webb* (2019) 7 Cal.5th 270, 278.)

1. Set level of restraint (consider least restrictive option(s) first)
   a. Release on the defendant's O.R. without restriction or conditions, where there is little or no risk of flight or to public safety.
   b. Release on the defendant's O.R. with nonfinancial conditions reasonably necessary for the protection of the public and victim, or to secure the defendant's appearance at future court proceedings, where there is some risk to the public or the victim, or of nonappearance.
   c. Payment of monetary bail if reasonably necessary to protect the interests of the state, but at a level the defendant can reasonably afford. A monetary condition may be imposed with or without non-monetary conditions.

2. Set conditions of release, including
   a. Electronic monitoring
   b. Regular check-ins with a pretrial case manager
   c. Community housing or shelter
   d. Drug and alcohol treatment (*Humphrey*, *supra*, 11 Cal.5th at p. 154.)
   e. Search and seizure waiver
   f. Drug testing
   g. Stay away/no contact orders

(E) Cost of conditions of release: Likely the court may not require the defendant to pay any costs associated with the conditions of release; any payment order must be based on ability to pay.

(F) If monetary bail is considered necessary to secure the state's interest in public safety and future court appearance, the court may set bail in an amount the defendant can

reasonably afford. Monetary bail may be required with or without other conditions of release.

(G) In addition to any other terms of release, the following conditions must be imposed on bail for stalking cases (§ 646.93, subd. (c)):

- Defendant is to have no contact with victim by any means.
- Stay away 100 yds. from victim, residence and employment.
- Not possess any deadly weapons or firearms.
- Obey all laws.
- Provide court, if requested, with contact information for residence and employment.

(H) Court must consider issuing criminal protective order on its own motion in domestic violence cases. (§ 136.2(a)(1)(G)(ii)(1).)

II. DEFENDANT TO BE DENIED BAIL

(A) Verify proper notice of bail hearing has been given the victim(s).

(B) Determine whether the defendant comes within article I, section 12 which permits denial of bail for designated offenses.

1. Capital crimes where "facts are evident or the presumption great" that defendant committed the offense. (Cal. Const., art. I, § 12(a).) Whether there is "evidence that would be sufficient to sustain a hypothetical verdict of guilt on appeal." (*In re White* (2020) 9 Cal.5th 455, 463 (*White*).)

2. Felony offenses involving acts of violence on another person or felony sexual assault, where "the facts are evident or the presumption great" that defendant committed offense and the court finds by clear and convincing evidence that there is a substantial likelihood defendant's release would result in GBI to others. (Cal. Const., art. I, § 12(b).) A finding of "substantial likelihood" is subject to review under a substantial evidence standard. (*White*, *supra*, 9 Cal.5th at p. 467.) "Clear and convincing evidence" means a showing that there is a "high probability" that the fact or charge is true. (*Ibid*.)

3. Felony offenses where "the facts are evident or the presumption great" that defendant committed the offense and court finds by clear and convincing evidence that defendant threatened another with GBI and there is a substantial likelihood defendant would carry out the threat if released. (Cal. Const., art. I, § 12(c).)

4. Consider *Humphrey* factors to determine whether some lesser form of restraint (conditions or monetary bail) will adequately protect the public and the victim, and/or assure defendant's future court appearances.

5. State all findings on the record, including the *Humphrey* factors, and enter in the minutes. The findings should include:
   a. The reasons why any lesser form of restraint is insufficient to protect the public and the victim, and/or assure defendant's future court appearances.
   b. Detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests.

6. Set custody status at "NO BAIL."

(C) Determine whether defendant may be denied bail pursuant to <u>article I, section 28(f)(3)</u>

1. Art. I, § 28(f)(3) directs: "In *setting, reducing or denying bail*, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. *Public safety and the safety of the victim shall be the primary consideration*." (Italics added.)

2. Enter finding that the facts are evident or the presumption great the defendant committed the charged offense.

3. Consider the factors listed in article I, section 28(f)(3), and in sections 1270.1 and 1275; make findings on the record.

4. Consider the *Humphrey* factors to determine whether some lesser form of restraint (conditions or monetary bail) will adequately protect the public and the victim, and/or assure defendant's future court appearances.

   a. One of the factors the court may consider is that the amount of monetary bail defendant can afford is insufficient to protect the state's interests. (*People v. Brown* (2022) 76 Cal.App.5th 296, 308.)

5. If the court so finds, it can state, "the court finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the protection of the public or safety of the victim, and/or future court appearances by the defendant."

6. Enter all findings on the record and in the minutes. Findings should include:

a. The reasons why any lesser form of restraint is insufficient to protect the public and the victim, and/or assure defendant's future court appearances.
b. Detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests.

6. If the required findings are made for detention, the court should set the custody status: "Although the defendant is eligible for bail, after consideration of the foregoing factors, and the provisions of article I, § 28(f)(3) and Penal Code § 1275, the court finds defendant's [risk to the public/victim] [risk of nonappearance] outweighs such eligibility and sets custody at 'NO BAIL.' "

APPENDIX II: CHECKLIST FOR PREHEARING RELEASE ON PROBATION VIOLATIONS

I. Defendant is on probation – NOT mandatory supervision, PRCS, or parole [§ 1203.25(a)]

A. Defendant is not serving flash incarceration [§ 1203.2(a)]

II. Misdemeanor VOP

A. May not deny release [§ 1203.25(d)]
   1. **Exception**: Defendant violated court order in the case
   2. Constitutional considerations [Const. Art. I, § 28(f)(3)]
      a. Protection of public and safety of victim
      b. Seriousness of charges
      c. Previous record
      d. Probability of appearing at hearing
   3. May release on conditions if clear and convincing evidence – see *infra*
   4. If defendant is released, use formal O.R. form [§ 1318] with any added conditions

III. Felony VOP

A. May not deny release [§ 1203.25(e)]
   1. **Exception**: clear and convincing evidence no reasonably available alternative to reasonably protect public and reasonably assure appearances
   2. Constitutional considerations [Const. Art. I, § 28(f)(3)]
      a. Protection of public and safety of victim
      b. Seriousness of charges
      c. Previous record
      d. Probability of appearing at hearing
   3. May release on conditions if clear and convincing evidence - see *infra*
   4. If the defendant is released, use formal O.R. form [§ 1318] with any added conditions

IV. Conditions of release

A. May impose conditions if clear and convincing evidence that conditions are needed to provide reasonable protection of public and reasonable assurance of future court appearance [§ 1203.25(a)]
B. Make individualized determination of factors indicating risk to public or flight risk [§ 1203.25(a)(1)]
   1. Findings based on all evidence and any probation report [§ 1203.25(f)]
   2. Assume truth of allegations of violation [*Humphrey*, *supra*, 11 Cal.5th 135, 153]
   3. Likely may not require risk assessment for setting conditions of release [possible use for determining suitability for release] [§ 1203.25(a)(2)]

C. Determining risk
    1. Consider Const. Art. I, § 28(f)(3) and §§ 1270.1 and 1275
        a. Protection of public [primary consideration]
        b. Seriousness of charge – weapons, injury, threats, use of drugs, potential sentence
        c. In DV cases – violations of protective orders, lethality, safety of victim and family, threats, past violence
        d. Criminal record
        e. Probability of appearance – record of past non-appearance
        f. Drug offenses – quantity of drugs, whether the defendant is on bail
    2. Factors in *Humphrey*, *supra*, 11 Cal.5th at p. 152
        a. Protection of public and victim
        b. Seriousness of charge
        c. Criminal record
        d. History of compliance with court orders
        e. Likelihood of future court appearance
D. Findings by the court
    1. Orally on record – entered in minutes if no reporter and requested by party [§ 1203.25(f)]
E. Conditions of release
    1. Conditions imposed must be the least restrictive necessary to protect the public and assure the defendant's appearance [§ 1202.25(a)(3)]
    2. Reasonable conditions: telephonic reporting, GPS, SCRAM or similar conditions [§ 1203.25(b)]
    3. May not impose bail unless clear and convincing evidence that other conditions are not adequate to protect public and assure appearance [§ 1203.25(c)(1)]
        a. Must be based on individualized determination
        b. Setting must be based on ability to pay cash bail (not bail bond)
    4. May not require defendant to pay for cost of conditions of release [§ 1203.25(b)]

V. VOP BASED ON NEW CRIME

A. If VOP based on new crime, may set bail independently of VOP procedures [§ 1203.25(g)]

    Review custody status and bail setting if defendant eligible for release on VOP but not on new crime

Exhibit C

Hon. Lisa Rodriguez

San Diego County Superior Court

Pretrial Release Considerations After *Humphrey II:*[1] An Annotated Checklist

1. PRELIMINARY CONSIDERATIONS	
Is Defendant Eligible for O.R. *(i.e., eligible for "nonfinancial conditions of release")*	Subject to other statutory requirements, *infra*, court can set, deny, or reduce bail where **protection of the public** or the **safety of the victim**, in combination with **seriousness of the offense**, previous **criminal record** of defendant, and the **probability of their appearing** at the trial or hearing of the case. Art. I § 28(f)(3);[2] PC 1275 (this section excludes "safety of the victim"). ❒ **Misdemeanors:** Entitled to OR release unless it will compromise public safety or not reasonably assure appearance. ❒ **Most Felonies:** Admitted to bail as a matter of right. PC 1271.
Is Defendant Eligible for Bail (*i.e., "bailable" or eligible for "financial conditions of release")*	
Defendant is not Eligible for Bail or OR Release	❒ **Charged with Offense punishable by death**: ***Cannot*** be admitted to bail when proof of guilt is evident or presumption is great. (PC 1270.5; Art. I § 28(f)(3); Art. I § 12(a).)
2. IF DEFENDANT IS ELIGIBLE FOR OR RELEASE, SUPERVISED OR, OR BAIL: ***Consider the following statutory requirements as to notice or hearings required, amount of financial bail to be set, conditions imposed or required, and further findings***	
Hearing may be required before bail is modified for these offenses[3]	❒ **Serious Felony**, PC 1192.7(c), or Violent Felony under PC 667.5(c). PC 1270.1(a)(1), 1319(a). ***Marsy's Law requires notice to the victim and reasonable opportunity to be heard.*** ❒ **Violent Felony**, PC 667.5(c), and defendant has previously failed to appear in another felony charge. PC 1319(b). ❒ **Felony or Misdemeanor listed in PC 1270.1:** PC 136.1 (intimidation of victim or witness), 262 (spousal rape), 273.5 (corporal injury), 422 (criminal threats-felony), or 646.9 (stalking); 273.5 (battery with traumatic condition), 243(e)(1) (spousal battery), 273.6 (violation of DV protective order as defined). PC 1270.1(a)(2)–(4).
Bail As a Matter of Right	❒ **All Other Felonies:** Release on non-excessive bail as a matter of right. PC 1271.
O.R. Presumed as a Matter of Right[4]	❒ **All Other Misdemeanors**
3. CONSIDER WHETHER DEFENDANT IS LIKELY TO RETURN TO COURT, OR IS A THREAT TO PUBLIC SAFETY	
Court Orders & Findings	(*In Re Humphrey (2021) 11 Cal.5th 135; In Re Brown (2022) 76 Cal.App.5th 296, 306-307*[5]) • **Little or No Risk of Flight or Harm:** Court may offer OR release with appropriate conditions (PC 1270) • **Risk of Flight or Risk to Public or Victim Safety:** Court should consider whether nonfinancial conditions of release may reasonably protect the

	public and the victim or reasonably assure the arrestee's presence at trial. The court must order the least restrictive conditions. • **If non-financial considerations are insufficient, court may consider whether Money Bail is Reasonably Necessary:** Court must consider the individual arrestee's ability to pay, along with the seriousness of the charged offense and the arrestee's criminal record, and –unless there is a valid basis for detention—set bail at a level the arrestee can reasonably afford. ❒ All findings are reviewable via writ of habeas corpus.
Protection of Public/Victim	❒ Specific articulable danger posed to public ❒ Specific danger that may be posed to other persons if defendant is released ❒ Specific potential danger to victims or witnesses if defendant is released ❒ Specific threats made by defendant in connection with this case ❒ Any past acts of violence by defendant/ recency ❒ In DV Case—Safety of victim, victim's children, and any other person who may be in danger if defendant is released
Seriousness of Offense Charged	❒ Possible penalty for offense charged[6] ❒ Defendant's role in alleged crime ❒ Defendant was on formal supervision at the time ❒ Victim's alleged injuries ❒ Alleged threats against victim or witness ❒ Alleged use of a firearm or other deadly weapon ❒ Availability of weapons ❒ Use or possession of a controlled substance/untreated addiction ❒ In possession of, or charged offense involved, large quantity of a controlled substance ❒ Children involved as victims or witnesses ❒ In DV Case—Current Violation of DV restraining order ❒ In DV Case—Evidence of Lethality, incl. evidence of strangulation ❒ In DV Case—Info presented by prosecutor re any current protective or restraining order on defendant issued by civil or criminal court
Defendant's Previous Criminal Record	❒ Prior history of convictions, including DV; Remote? ❒ Recent history of violence or weapons offenses ❒ Any current protective or restraining order issued by civil or criminal court ❒ In DV Case—Info presented by prosecutor re defendant's prior convictions for DV or other forms of violence or weapons offenses
Probability of Defendant Appearing at Hearing or Trial (Flight)	❒ Prior flight to avoid prosecution/Previous failures to appear or lack of prior failures to appear ❒ Evidence of past court appearances of defendant in case at hand ❒ Existence of any outstanding felony warrants ❒ Ties to community ❒ Potential loss of employment/earning

	❒ Consider likelihood of defendant returning to residence shared with victim, which could possibly give rise to additional violence. ❒ Demonstrated willingness or unwillingness to follow court orders ❒ Recent bench warrant history ❒ Any other info presented in investigative report prepared under PC 1318.1.
OTHER CONSIDERATIONS	
	❒ Mental condition of defendant ❒ General health of defendant ❒ Defendant's military service history ❒ Defendant's use of alcohol or controlled substances during or before alleged offense ❒ Threats of abduction of children ❒ Attempts by alleged victim to leave or end relationship with defendant
4. AFTER CONSIDERATION OF ABOVE, COURT HAS 3 OPTIONS OF PRETRIAL RELEASE:[7] • ***Release on O.R. or Supervised O.R. [with or without nonfinancial conditions]*** • ***Release with non financial condition(s)*** • ***Release secured by money bail (cash or commercial) that can be posted by defendant***[8]***, which can also include nonfinancial conditions of release***	
O.R. RELEASE or Supervised O.R. ***(and appropriate conditions)***	
When O.R. Is Prohibited	**Violent Felonies:** Defendant shall not be released on O.R. where it appears by clear and convincing evidence that he or she previously has been charged with a felony offense and has willfully and without excuse from the court failed to appear as required while that charge was pending. PC 1319(a)–(c).
When Notice and Findings Required	**Serious Felonies:** The prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter before any person accused of a serious felony is released on financial conditions of release or O.R. Art. I § 28(f)(3). When a judge or magistrate grants or denies bail or release on a person's O.R., the reasons for that decision shall be stated in the record and included in the court's minutes. Art. I § 28(f)(3).
Terms	❒ Court or magistrate may impose reasonable conditions on defendant as prerequisite to granting O.R. release. PC 1318(a)(2); *In re York* (1995) 9 C4th 1133, 1141. ❒ In imposing O.R. conditions, court or magistrate may weigh considerations relating to public safety extending beyond those intended to ensure defendant's subsequent court appearances. *In re York*, *supra*, 9 C4th at p. 1144; see PC 1270, 1275. ❒ Court or magistrate may impose conditions that may implicate defendant's constitutional rights, provided imposing such conditions is reasonable under the circumstances. *In re York*, *supra*, at pp. 1146–1147; see PC 1318(a)(2).

	❒ Conditions related to risk of flight. See *Van Atta v. Scott* (1980) 27 C3d 424, 438.
SUPERVISED O.R. RELEASE WHERE AVAILABLE *(Every county has different options)*	
Dependent on County, Subject to Same Restrictions Above	❒ Mental health services ❒ Residential or outpatient rehabilitation facilities ❒ Ankle bracelet/GPS monitoring ❒ Alcohol / Transdermal monitoring ❒ County pretrial services supervision/ Text Reminders
Issuance of criminal protective orders	
	❒ In all cases in which defendant is charged with a crime involving DV, the court shall, on its own motion, consider issuing a protective order upon belief that harm to, or intimidation, or dissuasion of a victim or witness has or will occur. PC 136.2(a)(1)(G)(ii). ❒ An order may restrict defendant's access to the family residence and may bar communication by defendant or defendant's agent with the victim, except through an attorney, or under such reasonable restrictions as the court may impose. PC 136.2(a)(1)(D), 136.3. ❒ Criminal protective orders may be issued either as a condition of O.R. under PC 1275, 1318(a)(2), or as an independent order under 136.2.
CONSIDER FINANCIAL BAIL IN AN AMOUNT DEFENDANT CAN AFFORD (Only if non-financial conditions are insufficient to ensure public safety or return to court)	
Setting amount & appropriate conditions	
When Notice and Findings Required	**Serious Felonies:** Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter. Art. I § 28(f)(3).
How much bail and what conditions can be imposed?	❒ Using the bail schedule as a starting point, find an amount that defendant **<u>can post</u>** that will reasonably assure his or her return to court and secure public safety and the safety of any victim • For commercial bonds, consider that defendant must not actually post 10% for a commercial bond as bail agents require 2% and the remaining premium can be financed at very high interest, may be paid in installments, and collateral, if any, is often posted by the victim.[9] Under the "Rebate Law," premiums can be as low as 1% and unlike financial institutions, bail agents and sureties are not required to collect or report data on who cosigns or repays loans despite acting as lenders.[10] Also, neither defendant nor family ever get the premium back even if defendant makes all court

	appearances, charges are dropped, etc.[11] Finally, forfeitures are rarely paid to the court.[12] • *Consider A Cash Bail Amount:* In considering an amount money bail defendant and/or family can actually post, the court may also select a CASH BAIL amount (10% of the amount in the bail schedule can be a good starting point) and *specify that it must be posted by defendant or his/her family in lieu of a commercial bond*. Defendant gets this money back and it is actual cash defendant may forfeit if he/she fails to return. If defendant makes all court appearances, he/she can get the cash bail back. • *e.g.* the Bail Project often posts 10% of the bail amount selected by the court from the bail schedule and posts that cash with the court. ❒ Because a trial court has inherent power to impose bail conditions, the trial court may impose bail conditions intended to ensure public safety. *In re McSherry* (2003) 112 CA4th 856, 861–863. Bail conditions must be reasonable. *Gray v. Superior Court* (2005) 125 CA4th 629, 642. ❒ In cases involving Stalking, PC 646.93(c): 5 bail conditions required.[13] ❒ In cases involving Serious & Violent Felonies: Court can't depart from scheduled bail amount without unusual circs. pursuant to PC 1275(c).[14]
Determining Defendant's Ability-to-pay	
	❒ Consider any individualized circumstances presented by defendant. ❒ Consider whether defendant is indigent and/or represented by a public attorney. ❒ Consider defendant's "present financial position," "reasonably discernible future financial position up to 6 months in the future," "likelihood that the defendant will be able to obtain employment within 6 months," and "any other factor or factors that may bear upon the defendant's financial capability." PC 987.8(g)(2). ❒ The court may not set bail beyond defendant's means. "Conditioning freedom solely on whether an arrestee can afford to pay is unconstitutional." *In Re Humphrey, p. 143.*
Is the Financial Condition of Release, *in effect*, Detaining the Defendant Pretrial?	
Meaning	If the court has selected an amount of cash or commercial bail that it has determined necessary to maintain public safety or assure defendant's return to court and has determined that the amount cannot be posted by defendant, then the bail amount has the effect of constructively detaining defendant (*de facto* detention). The court **cannot** constructively detain defendant (preventive detention or pretrial detention). If the defendant cannot afford the amount of bail that the court deems is necessary to protect public safety or ensure a return to court, then the court must either set bail in an affordable amount or

	set no bail. However, the court can only set no bail if there are factors that justify preventive detention. If so, then the court must also state its findings and reasons on the record and include them in the minutes.[15]
5. PREVENTIVE DETENTION PER Art. I § 12(a), (b) or (c) or Art. I § 28	
Evidence	❒ Court can only consider preventive detention after finding there is no less restrictive means available to ***reasonably*** protect public safety or ensure a return to court.[16] ❒ Defendant has a right to be represented by counsel; if he or she is *pro se*, counsel may be appointed. ❒ Nothing in *Humphrey* or *Salerno*[17] requires live testimony.[18] ❒ Prosecutor may show evidence of dangerousness or failure to return to court by proffer or argument.[19] ❒ Defendant may present evidence of a less restrictive alternative to detention by proffer or argument.[20] ❒ Courts must undertake an "*individualized consideration* of the relevant factors", i.e., "risks to public or victim safety or to the integrity of the judicial process that are reasonably likely to occur;" understanding there is always risk, identifying "articulable threats to an individual or the community."[21] ❒ Court must preliminarily assume the truth of the criminal charges when considering safety of the victim, and protection of public.[22] ❒ Court must "careful[ly] balance[e] the government's interest in preventing crime against the individual's fundamental right to pretrial liberty." (*Ibid.*))
Defendant Not Entitled to Bail (*i.e., "not bailable")* Art. I § 12(a)–(c)[23] Art. I § 28(f)(3)	❒ **Capital offense** PC 1270(a) (when facts are evident, and the presumption great). ❒ **Felony offenses involving acts of violence** on another person, or felony sexual assault offenses on another person, when the *facts are evident or the presumption great* and the court finds based upon *clear and convincing evidence* that there is a *substantial likelihood* the person's release would result in great bodily harm to others. Art. I § 12(b). ❒ **Felony offenses** when the *facts are evident or the presumption great* and the court finds based on *clear and convincing evidence* that the person has threatened another with great bodily harm and that there is a *substantial likelihood* that the person would carry out the threat if released. Art. I § 12(c). ❒ **Criminal offense** when there are no less restrictive conditions or combination of conditions that will reasonably protect the safety of the public or victims or ensure a defendant's appearance in court. Art 1 § 28(f)(3).[24]
Court Orders and Findings	**If a Court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released:** It may detain the arrestee only if it first finds, by clear and convincing evidence, that

no nonfinancial conditions and/or financial conditions of release can reasonably protect those interests.

Standard for Risk of Flight: "After consideration of the facts presented by both sides Court finds by clear and convincing evidence that no condition or combination of conditions of release can reasonably assure the arrestee's appearance in court."[25]

Standard for Danger: "After consideration of the facts presented by both sides, the court finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the protection of the public or the safety of the victim."[26]

❒ Court must make findings in the minutes that[27]:

- Indicate the court considered the non-financial and financial conditions and the specific facts that persuaded it that those conditions were insufficient to reasonably ensure a return to court or public/victim safety.
- Do not state bare conclusions that there was a likelihood defendant would flee based on the potential prison term.
- Analyze risk of flight (i.e., ties to the community, record of appearance, and criminal history); consideration only of the potential penalty will be insufficient to counterbalance considerations involving community ties or record of appearance.
- "Engage in careful and reasoned decision making" and "articulate its evaluative process and show how it weighed the evidence presented in light of the applicable standards."

Definitions

- ***Facts are evident or presumption great:*** The described felony offense must be proven by this standard. It is: "by assessing whether the record, viewed in the light most favorable to the prosecution, contains enough evidence of reasonable, credible, and solid value to sustain a guilty verdict on one or more of the qualifying crimes."[28]
- ***Clear and convincing evidence:*** The *substantial likelihood* (see below) must be proven by clear and convincing evidence. It is: A finding of high probability "so clear as to leave no substantial doubt," "sufficiently strong to command the unhesitating assent of every reasonable mind."[29]
- ***Substantial likelihood:*** Court must find that there is a substantial likelihood that release will result in "great bodily harm," § 12(b), or that "the person would carry out the threat if released," § 12(c). The trial court must be convinced that future violence amounting to great bodily injury is substantially likely if defendant were released on bail.[30]

Appellate Review: In the post-preliminary hearing context, these decisions are reviewed for substantial evidence.

Pretrial Release Considerations After *Humphrey* (cont.)

6. POST CONVICTION	
Bail after Conviction	A defendant who has been convicted of an offense not punishable by death may request the court for a release on bail pending defendant's application for probation or appeal. Bail is a matter of right under the following circumstances: • Before judgment is pronounced, pending an application for probation in misdemeanor cases. PC 1272(1). • When an appeal is from a judgment imposing a fine only, whether for misdemeanor or felony. PC 1272(1). • When an appeal is from a judgment imposing imprisonment in misdemeanor cases. PC 1272(2). • As a matter of discretion in all other cases. PC 1272(3). If motion for release on bail is after sentencing hearing, defendant shall provide notice of hearing on bail motion to prosecutor at least 5 court days before hearing. See PC 1272.1.
Bail when a person is on formal supervision	A person on Mandatory Supervision, Post Release Supervision or Parole who is alleged to have violated the conditions of their supervision is generally not entitled to bail.[31]
Bail for Probationers	AB 1228 changed the standard of release for persons on probation who are alleged to have violated the terms and conditions of probation. A person on probation is presumptively eligible for release.[32] • **Misdemeanors**: The court must hold a formal revocation hearing before a denial of release unless the defendant failed to comply with a court order. • **Felonies:** The court shall not deny release before a formal revocation hearing unless there is clear and convincing evidence that there are no reasonable means to protect the public and ensure appearance • **Particularized circumstances** require imposition of an order. • **Individualized determination** of the factors that do or do not include a danger to the public. • **Findings** on the record are required. - No means reasonably available to provide reasonable protection and reasonable assurance of appearance - Danger to the public - No other conditions than financial bail are adequate to protect public or provide reasonable assurance of return to court
Conditions of Bail for Probationers	• Least restrictive conditions - Cannot require use of assessments in setting conditions - Cannot require the probationer to pay for conditions • Can only order financial conditions if there is clear and convincing evidence that other reasonable conditions are not adequate - Can only consider cash bail amount, not bail or property bond - Must be set at amount the probationer can reasonably afford

[2] Cal. Const., art. I, § 28(f)(3) states, "A person ***may*** be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great." The permissive language in this section arguably limits the "right to bail" for all crimes and permits a judicial officer to "set[], reduc[e], or deny[] bail" when considering "the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case." This article also states that "*[p]ublic safety and the safety of the victim shall be the primary considerations."* This section—Public Safety Bail—was added by Marsy's Law in 2008. Thus far, there are no cases defining its use in denying bail.

[3] A hearing is required, with notice to the prosecutor and the defense attorney, before a person arrested for a violation of PC 136.1(c), 243(e)(1), 262, 273.5, 273.6, 422, or 646.9 ***may be released on bail higher or lower than the county bail schedule***. See PC 1270.1. In stalking cases, the prosecutor must make all reasonable efforts to notify the victim. The victim may be present at the hearing and shall be permitted to address the court on the issue of bail. PC 646.93(b).

[4] Bail is presumed as a matter of right pursuant to Cal. Const., art. I, § 12, however art. I, § 28(f)(3) permits a judicial officer to "set[], reduc[e], or deny[] bail" for all but capital crimes when considering "the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case." This article also states that "*[p]ublic safety and the safety of the victim shall be the primary considerations."*

[5] The court in *In re Brown* (2022) 76 Cal.App.5th 296, 305-306, explained that the Supreme Court, in *In re Humphrey* (2021) 11 Cal.5th 153, found that a trial court must:

1. First determine whether an arrestee is a flight risk or a danger to public or victim safety
2. If the arrestee is a flight risk or a threat to public safety, then the court should consider if "nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial." (*Humphrey.* at p. 154.)
3. If the court concludes those conditions are insufficient, then the court can consider whether money bail would be "reasonably necessary" to protect the public and ensure a return to court.
4. If money bail is necessary then, it must be "set at a level the arrestee can reasonably afford."
5. The court can only deny bail if the court finds "by clear and convincing evidence that no non-financial condition in conjunction with affordable money bail can reasonably protect public safety or arrestee appearance."

[6] PC 1275(a); see *Van Atta v. Scott* (1980) 27 C3d 424, 438, fn. 12 (court must consider severity of sentence detainee faces, though this factor should not be considered dispositive).

[7] See *In Re Humphrey (2021) 11 Cal.5th 135*

[8] Although some courts have traditionally set high bail in order to detain those defendants perceived to be dangerous to the public, or who chronically fail to appear, the court in *Humphrey I* construed this practice as a form of constructive or *de facto* detention before trial. In *Humphrey II*, the court specifically prohibited this practice holding that the court "may not effectively detain the arrestee solely because the arrestee lacked the resources to post bail," and "detention in these narrow circumstances doesn't depend on the arrestee's financial condition."(*Humphrey*, p. 237-238.) *In re Brown* affirmed this holding "what the trial court may not do is make a continued detention dependent upon the arrestee's financial condition" and "setting bail, knowing full well that it was the equivalent of a pretrial detention order is directly at odds with the requirements for a constitutionally valid bail determination." (*Brown,* p. 306-307).

[9] Pretrial Detention Reform Workgroup, Recommendations to the Chief Justice, October, 2017 at p. 34. (https://www.courts.ca.gov/documents/PDRReport-20171023.pdf)

[10] *Id*. at p. 35-36.

[11] Id. at pp. 29-31.

[12] In Los Angeles County from May 2016 to May 2017, approximately $1.73 billion in surety bonds was posted with the Superior Court of Los Angeles County. Because defendants in Los Angeles typically pay an upfront 10 percent fee to purchase the bail bond (or pay a smaller percentage and agree to an installment payment plan for the remainder of the fee), this figure translates to approximately $173 million in nonrefundable dollars paid by defendants to bail agents, not including interest or administrative fees. In that same period, defendants made cash deposits to the

court of $13.6 million (less than 1 percent of the $1.73 billion posted in bonds and less than 8 percent of the $173 million in fees paid to purchase those bonds). In the same one-year period, a total of $3.8 million in bail was ordered forfeited by the court, of which $2.7 million was collected by the courts and county—$1.4 million from surety companies and nearly the same amount, $1.3 million, from forfeited cash bail, even though the amount of cash bail deposited with the court was a tiny fraction of the amount of bail bonds posted. (*Id*. at p. 38.)

[13] PC 646.93(c) states, "Unless good cause is shown not to impose the following conditions, the judge shall impose as additional conditions of release on bail that: [¶] (1) The defendant shall not initiate contact in person, by telephone, or any other means with the alleged victims. [¶] (2) The defendant shall not knowingly go within 100 yards of the alleged victims, their residence, or place of employment. [¶] (3) The defendant shall not possess any firearms or other deadly or dangerous weapons. [¶] (4) The defendant shall obey all laws. [¶] (5) The defendant, upon request at the time of his or her appearance in court, shall provide the court with an address where he or she is residing or will reside, a business address and telephone number if employed, and a residence telephone number if the defendant's residence has a telephone. [¶] A showing by declaration that any of these conditions are violated shall, unless good cause is shown, result in the issuance of a no-bail warrant."

[14] What was not addressed in *Humphrey* was Penal Code section 1275, subdivision (c) which states: "Before a court reduces bail to below the amount established by the bail schedule approved for the county, in accordance with subdivisions (b) and (c) of Section 1269b, for a person charged with a serious felony, as defined in subdivision (c) of Section 1192.7, or a violent felony, as defined in subdivision (c) of Section 667.5, the court shall make a finding of unusual circumstances and shall set forth those facts on the record. For purposes of this subdivision, "unusual circumstances" does not include the fact that the defendant has made all prior court appearances or has not committed any new offenses." However, presumably, because *Humphrey* requires a "superior court must undertake an individualized consideration of the relevant factors," the "risk" assessed in a given bail amount in a schedule will not outweigh the due process and equal protection concerns identified by the California Supreme Court. Thus, if a defendant is charged with a serious or violent felony, the court may not set bail at any amount that the defendant cannot afford, even that posed in the bail schedule unless the court can determine by clear and convincing evidence that no less restrictive alternative than detention exists. If the court can set bail lower than the bail schedule at an amount that the defendant can afford (commercial or cash bail with the court) and in an amount that will assure the defendant's return to court, or the safety of the public, (even if that amount is less than the bail schedule) then the court is required to set it at the lower amount.

[15] "If money bail set at that level is not sufficient to protect the state's compelling interests, then the trial court's only option is to order pretrial detention, assuming the evidentiary record is sufficient to support the findings necessary to justify such an order." ***In re Brown*** (2022) 76 Cal.App.5th 296

[16] "Here, there was no evidence proffered in the trial court to support the contention that harm to the public was reasonably likely to occur if Brown were released. The trial court failed to address any of the specific nonfinancial conditions proposed by Brown or to indicate, even in general, why nonfinancial conditions of release (such as a stay away or no contact order, home detention, electronic monitoring or surrender of Brown's Class A driver's license) would be insufficient to protect the victims or the public or obviate the risk of flight. On this record we cannot conclude there was sufficient evidence to support a finding by clear and convincing evidence that less restrictive alternatives to detention could not reasonably protect the public or victim safety." (*Brown*, *supra*, 76 Cal.App.5th at p. 307.) "[E]ven though the general presumptions in favor of a judgment or order might otherwise support a finding made *sub silentio*, *Humphrey* specifically requires, as a matter of procedural due process, that a court entering a pretrial detention order set forth 'the reasons for its decision on the record and to include them in the court's minutes.' (*Harris, supra, 71 Cal.App.5th at 1104-1105.)*

[17] *Salerno*, *supra*, 481 U.S. 739.

[18] The court in *Salerno*, which was relied on in *Humphrey*, contemplated the constitutionality of preventive detention within the meaning of the Federal Bail Reform Act of 1984. There, probable cause determinations in the pretrial context are made within the meaning of *Gerstein v. Pugh* (1975) 420 U.S. 103, 120: "That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof." Unlike the federal government and those states with statutory pretrial release structures similar to the Federal Bail Reform Act, California offers defendants a limited due process hearing within ten days of arraignment, i.e., a preliminary hearing. Thus, in California, at arraignment, a lesser showing has traditionally been employed as courts generally

assume the truth of the charges as stated in the complaint until the preliminary hearing. See *In re Application of Horiuchi* (1930) 105 CA 714.

[19] *In re Harris* (2021) 71 Cal.App.5th 1085, 1101, "In sum, we conclude as a general matter, that proffers of evidence may satisfy [Article I,] section 12(b)'s clear and convincing evidence standard without offending federal or state due process principles. In so concluding, we emphasize that it remains within the discretion of the trial court to decide whether particular instances of proffered evidence may be insufficient, and whether to insist on the production of live testimony or other evidence in compliance with more stringent procedural requirements." However, the California Supreme Court granted review on this issue. (See, Endnote 25.)

[20] *See*, Endnote 19.

[21] *Humphrey* (2021) Slip Op., at p. 22.

[22] *Id.* at p. 18, citing (*See*, *Ex parte Duncan* (1879) 53 Cal. 410, 411; *Ex parte Ruef* (1908) 7 Cal. App. 750, 752.)

[23] Cal. Const., art. I, § 12 states, "A person ***shall*** be released on bail by sufficient sureties, except for [three classes of crimes]." Pursuant to this section, the mandatory language creates a right to bail in all but the three classes of crimes listed. *In re Christie* (2001) 92 CA4th 1105, 1109 ("Although [art. I, § 12] permits preventive detention, there is no contention that the instant matter qualifies. For all other offenses, bail is a matter of right. (Cal. Const., art. I, § 12; PC 1271 [bail before conviction is a matter of right]; *Ex parte Newbern* (1961) 55 C2d 500)").

[24] Some commentators question whether bail can be denied for offenses not listed in Art. I, § 12 (e.g., misdemeanors, non-violent felonies) under Art. I, § 28. The California Supreme Court has recently declined to address this question, stating, "we leave for another day the question of how two constitutional provisions addressing the denial of bail — article I, sections 12 and 28, subdivision (f)(3) — can or should be reconciled, including whether these provisions authorize or prohibit pretrial detention of noncapital arrestees outside the circumstances specified in section 12, subdivisions (b) and (c)." (*In re Humphrey* (2021) 11 Cal.5th 135, 155, fn. 7.)

[25] Some commentators question whether bail can be denied based on a risk of failure to appear alone. The California Supreme Court has recently declined to address this question, stating, "[w]e have not been asked to decide and do not determine here whether the California Constitution permits pretrial detention based on risk of nonappearance or flight alone, divorced from public and victim safety concerns." (*In re Humphrey* (2021) 11 Cal.5th 135, 153, fn. 6.)

[26] The Court must find by "clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements." (*In re Humphrey* (2021) 11 Cal.5th 135, 143; *In re Brown* (2022) 76 Cal.App.5th 296, 299.)

[27] *In re Harris* (2021) 71 Cal.App.5th 1085, *Rev. Granted* on the following issue: "What evidence may a trial court consider at a bail hearing when evaluating whether the facts are evident or the presumption great with respect to a qualifying charged offense, and whether there is a substantial likelihood the person's release would result in great bodily harm to others? (Cal. Const., art. I, § 12, subd. (b). Pending review, the opinion of the Court of Appeal, which is currently published at 71 Cal.App.5th 1085 [287 Cal. Rptr. 3d 46], may be cited not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456 to choose between sides of any such conflict. (See *Standing Order Exercising Authority Under California Rules of Court, Rule 8. 1115(e)(3), Upon Grant of Review or Transfer of a Matter with an Underlying Published Court of Appeal Opinion,* Administrative Order 2021-04-21; Cal. Rules of Court, rule 8.1115(e)(3) and corresponding Comment par. 2.)." (*In re Harris* (2022) 291 Cal.Rptr.3d 212.)

[28] In defining "facts are evident or the presumption great," the California Supreme Court stated: "Our court, in step with the broad consensus that has since emerged in other states, has interpreted this odd terminology to require evidence that would be sufficient to sustain a hypothetical verdict of guilt on appeal. (See *In re Weinberg* (1918) 177 Cal. 781, 782 ; *Matter of Salvator Troia* (1883) 64 Cal. 152, 153 [28 P. 231]; *In re Nordin* (1983) 143 Cal.App.3d 538, 543; see generally 8A Am.Jur.2d (2019) Bail and Recognizance, § 62, pp. 398–399.) Whether that evidentiary threshold has been met is a question a reviewing court considers in the same manner the trial court does: by assessing whether the record, viewed in the light most favorable to the prosecution, contains enough evidence of reasonable, credible, and solid value to sustain a guilty verdict on one or more of the qualifying crimes." (*In re White* (2020) 9 Cal.5th 455, 463.)

[29] " ' "Clear and convincing" evidence requires a finding of high probability.' [Citation.] The evidence must be ' "so clear as to leave no substantial doubt"; "… unhesitating assent of every reasonable mind." ' " (*In re Nordin* (1983)

143 CA3d 538, 543.) "Clear and convincing evidence requires a specific type of showing—one demonstrating a "'high probability'" that the fact or charge is true." (*In re White* (2020) 9 Cal.5th 455, 467.)

[30] Whether an arrestee poses a substantial likelihood of great bodily harm to others is a determination similar to what must be found under these statutory schemes (SVPA and NGI)—and each of these schemes involves the decision whether to restrict a person's liberty. What we conclude is that the danger posed by an arrestee if released on bail is likewise a question of fact we review for substantial evidence. (*In re White* (2020) 9 Cal.5th 455,466.)

[31] *In re Law* (1973) 10 Cal.3d 21, 25-26.

[32] Penal Code §§ 1203.2; 1203.25.

Exhibit D

Hon. Brett Alldredge

Tulare County Superior Court

There are these two young fish swimming along and they happen to meet an older fish swimming the other way, who nods at them and says "Morning, boys. How's the water?" And the two young fish swim on for a bit, and then eventually one of them looks over at the other and goes, "What the hell is water?"
-David Foster Wallace, Kenyon College graduation 2005

"There is a paradox at the heart of American bail practice. We rarely deny release on bail and yet we routinely deny release on bail."
-Tim Schnacke
-Professor Sandra G. Mayson

Introduction

My name is Brett Alldredge and I am now in my 28th year serving on the Tulare County Superior Court, a mid-sized rural county in the San Joaquin Valley. My assignment for the last eight years has been to a dedicated felony pretrial department. It is in this assignment that I have heard and ruled in thousands of bail and pretrial detention hearings. Since the enactment of AB 109 I have been my court's judicial liaison to our local CCP and recently completed a two-year term as my court's Presiding Judge (now referred to as "The Covid Term"). It has been over this long period and in these combinations of roles that has given me an evolved, especially close, and first-hand experience with California's use of financial conditions as the almost exclusive tool for determining both pretrial detention and release and the need for not just reform, but for comprehensive reimagination, redesign, and transformation.

Without hesitation, I can state in the absence of direct statutory or constitutional clarity and directive even our own California Supreme Court's seminal decision in *In Re Humphrey* and its progeny has done observably little to reverse more than a century of California's judicial devotion to what many have called the worst misunderstanding in the entire criminal justice system: the ability to be "admitted to bail" was created, even enshrined in our state constitution, as a mechanism to allow an arrested individual a method to get out of custody pending trial but has long since devolved, been devalued, and aggressively defended as a money based system intentionally used as a means of keeping them in.

Although the overwhelming majority of these arrested individuals are almost immediately eligible for release pursuant to fixed schedules adopted by each county, ostensibly allowing them the ability to immediately walk out of jail only by the payment of a specified sum of money, almost no one deposits the astonishingly high amounts reflected therein. Instead, for decades the California legal system has offloaded that release-for-purchase decision to an industry operating totally outside the justice system itself. Today in California, almost regardless of the present dangerousness of the individual and the circumstances of the charged crime, one can buy release from custody at any time by paying an arbitrarily determined, much lesser amount to a private business which it is allowed to keep as a nonrefundable "premium."

I wasn't long in this assignment before I noticed that a sizable number of the dozens of persons transported by the sheriff into my department every day were neither accused of a serious or violent crime against a victim but were in pretrial custody only because they could not afford the very high amounts of money deposit that our court's schedule mandated. Beginning with this population, I began asking counsel why the particular individual before the court was in custody if he or she didn't pose a risk to another individual or to the community. Because the answer was almost always, "Because s/he can't afford bail," after a hearing I began releasing many of these persons to return back to their families and jobs on their OR. As you can imagine, at the beginning it was always over the strenuous reflexive objection of the district attorney.

Development of Pretrial Services in Tulare County

It next occurred to me that that while felony judges in my court were routinely sentencing dozens of individuals every week into supervised probation who were actually convicted of committing a felony offense with little or no assessment of their likelihood to commit a future crime, why couldn't the Probation Department assist the court in identifying and safely supervising and supporting those individuals determined to be low risk who hadn't yet been convicted of anything? It was an arduous process, however I was eventually able to persuade our outstanding then Chief Probation Officer to take on this responsibility and she eventually created what is now an entire pretrial division within their department that operates with great success for this exclusive purpose.

Once established, we collaboratively designed local policies and procedures to support and encourage informed judicial pretrial decision making to replace what had been a long entrenched history of depending exclusively on the payment of money bail to gain pretrial liberty. We researched nationwide for what tools had been developed and validated as best measuring evidence-based risk assessment. After determining that the Pretrial Safety Assessment (PSA) designed by The Arnold Foundation (now Arnold Ventures) was the optimal tool for our purposes, we lobbied for and were ultimately chosen as only the third county in California to receive comprehensive training and education using what was at that time their proprietary intellectual property. We established and supported a two-part process where the PSA would be prepared prior to and made available to the arraignment magistrate as well as the pretrial judge for reference in subsequent individualized pretrial detention hearings.

Based largely upon the success we achieved in prioritizing and reimagining our pretrial justice process, Tulare County was one of 16 California courts (one of four mid-sized courts) chosen to be part of the Pretrial Pilot Project established by the Judicial Council's Pretrial Detention Reform Workgroup (PROW). Supported by our Probation Department and the availability of the PSA, our local pilot established a system of 7 days/week pre-arraignment judicial review, enabling a judicial officer to responsibly either release OR those individuals evaluated as a low likelihood to offend or flee the jurisdiction, release under the supervision and support of the Probation Department those determined likely to be safely successful on supervision on specific conditions related to their record and the charged offense, or to detain until arraignment those

determined to be either an unreasonable risk or when more information would be required to make such a determination.

Personal Observations of the Use of the Current Money Bail System In Court

In spite of the significant transformative systemic progress achieved in Tulare County and in several others in the state, the habitual use of a money bail system in California continues to exert formulaic influence over what should exclusively be individualized judicial decision making. While I respect many who have participated in what passes as public discourse concerning this fundamental cornerstone of justice, most have no experience or idea whatsoever with what this actually looks and feels like in practice. In my supervisorial capacities I have reviewed thousands of money bail orders made in my own court, including:

- 10, 20, and even a 54 million-dollar money bail order in non-capital cases;

- Numerous one million-dollar money bail orders made in misdemeanor cases for missed court appearances (FTA);

- The continued use of “stacked” money bail in misdemeanor cases resulting in aggregate bail of as high as $720,000; and

- Thousands of money bail orders routinely made in low level misdemeanor cases of $60,000 or more for a single missed court appearance in an attempt to optimize a “no cite” arrest by law enforcement.

At the other end of the continuum:

- Almost every day 3 or 4 individuals appear in my department for arraignment after having been arrested and paying a non-refundable premium for a substantial money bail bond (30, 50, $100,000) where no complaint has been filed by the district attorney. After appearing one additional time a couple of weeks later with still no complaint filed, their bail bonds are ordered exonerated, however despite not being charged with any crime whatsoever, their non-refundable premium in the thousands of dollars is lost forever.

- As if this scenario could not possibly get any worse, because these cases are not internally flagged within the prosecutor’s office, if a deputy district attorney decides to file a complaint months later they usually ask for and receive an arrest warrant, causing the then freshly charged defendant to be arrested once again and pay yet another nonrefundable premium for a money bail bond to maintain their pretrial release, despite their timely appearing as promised two separate times before as ordered by the court.

- I have presided over numerous cases involving multiple defendants charged with serious or violent felonies where the alleged “heavy” is out of custody pretrial after paying substantial money bail ($500,000-$750,000-from what source who knows) while the

obviously lower level participants sit in pretrial custody for months because they cannot find or convince a woman (money bail is almost always paid by a woman, too often the alleged victim) to pay their scheduled money bail.

- I have presided over numerous cases where an individual is charged with an undeniably violent crime, has had a relative post a money bail bond of hundreds of thousands of dollars and then, while out on bail, allegedly commit another violent felony…and then have the same sympathetic relative spring him again simply by paying for yet another, usually larger, money bail bond.

Need for Transformation

It has oft-been said that in a system where more than 90% of all criminal filings are resolved prior to trial, “Pretrial justice determines everything.” I have been directly asked whether I believe that recent appellate decisions were sufficient to meaningfully change what has long been both an unfair and unsafe system or whether a strong legislative or constitutional response was necessary to bring justice to a process that bears no resemblance to its original design and intended purpose.

I believed that SB 10 was a solid legislative statement and a step in the right direction in ending a devolved and obviously unsafe and unfair system, especially by reposing the responsibility of making pretrial detention decisions where they should exclusively belong, in the judiciary. But as I listened closely to those whose support many assumed would be presumably reliable later back away from their endorsements, I realized that their fears, although communicated in terms of distrust in what they suspected to be racially-biased algorithms, more fundamentally contained an uncomfortable truth: risk averse judges, politically fearing the dreaded headline of “accused killer recently ‘let out’ of custody by Judge Smith," would over-detain a population who statistically and comparatively pose relatively little likelihood of committing any crime while awaiting trial.

Those concerns have unfortunately been confirmed both by subsequent conversations with many of my colleagues throughout the state and by my careful attention to the thousands of bail decisions made by judges in my own court in the past few years. When recently asked how many times they have ordered individuals charged with obviously violent and dangerous crimes other than murder to be detained at no bail after making the necessary findings required by California's constitution, two of my recently retired colleagues with a combined 50+ years of criminal experience each answered “Never." When I then asked how often they had simply set money bail intentionally to be at unaffordable amounts in the millions of dollars to achieve the same result, they both honestly responded, "More times than I can remember.”
“What the hell is water?”

The Legislature's most recent opportunity to even modestly reform this unsafe and unfair system, SB 262, ultimately couldn’t even muster the votes necessary to pass what had been

pared down to contain essentially only two provisions that were completely devoid of any legitimate opposition grounded in justice:

1. Specifying that a defendant could not be charged for the cost of pretrial release conditions and
2. The return of posted money bail if either no charging complaint is filed within 60 days of arrest or if the criminal proceedings are dismissed.

In the week preceding the end of this year's session, I noticed the resurfacing and republication of years-old feared headlines of the type described above. I also noticed articles containing the predictable opposition of California's multi-million dollar bail industry. What I don't recall noticing, however, was a single statement of support from any elected official able or willing to speak knowledgeably about the issue at all, even from a number of public officials elected or appointed statewide who had previously and most publicly supported bail reform as essential to positively reforming overall criminal justice in California.

Especially telling were the 19 Assemblymembers who chose to abstain from even casting a vote.

California's trial court judges however, themselves facing election every six years, do not have the luxury of abstaining. They must face daily every person in their community affected by their pretrial decisions. If an historic majority of elected representatives are unwilling to vote in support of a watered down reform bill, how many elected superior court judges, each working entirely on their own, many in the most infamous of "tough on crime" jurisdictions in California, can be expected to make these difficult and often agonizing decisions without unequivocal legislative or constitutional support? I know the answer to my own rhetorical question. The ghosts of challenged or recalled colleagues, however distinguished and respected they may have been in their sworn service to the public, still linger.

It is entirely appropriate and right to hold judges accountable within the justice system for making a wrong decision. There is a world of difference, however, between a bad decision and a bad outcome. In the present climate, too many of my colleagues are concerned that they will be held politically responsible to guarantee against any bad outcome, however unforeseeable.

Addressing Section 12 and Section 28 of the California Constitution

Having spent more than a decade in a felony criminal assignment, I was persuaded long ago that the rationale of Justice Kline's intermediate appellate opinion in *In Re Humphrey* was just, necessary, and well-reasoned. But as my daily experience reveals however, despite our Supreme Court's own subsequent unequivocal holding in *Humphrey* ("pretrial detention based solely on a person's inability to pay is unconstitutional"), thousands of charged individuals remain detained in California on extraordinarily high and unaffordable amounts of money bail, not as a result of a judge making the required findings set forth in the intentionally narrow detain

conditions contained in Article 1, Sec. 12, but by the amorphous “public safety” language in Sec. 28(f)(3) or choosing to ignore the *Humphrey* decision altogether.[1]

Ideally, Article 1, Secs. 12 and 28(f)(3) should be amended and reconciled. The amendment should specifically identify and delineate those very limited list of crimes and circumstances that permit pretrial detention. It should clearly guarantee the presumptive release of those charged individuals found by a judge to pose no unreasonable risk either to the safety of the public or to an identified victim. It should also clearly describe the findings necessary to be made when assessing likelihood of pretrial success to support a judge's discretion in ordering conditions of supervised release that are related and relevant to these specific compelling interests of the state.

Unfortunately, *In Re Humphrey* left some (intentional?) holes that require responsive legislative or constitutional attention. Not clearly addressed by statute or presently contemplated by Article I, Sec. 12 ("acts of violence" or “when the person has threatened another with great bodily harm”) but unfortunately encountered by judges with some regularity, is the case of the charged DUI defendant with 4, 5, or more prior similar convictions within the past few years. This charged individual has likely driven under the influence dozens of times for each one of his or her arrests and presents a greater clear and immediate danger to innocent members of the community than does an alleged notorious armed bank robber. I make an exhaustive record in each of these cases regardless of the decision, but admit that in a limited number have determined there were no less restrictive means other than pretrial detention to incapacitate them from repeating this conduct and ordered them detained without the ability to bail, finding them within what is contemplated in Article I, Sec. 12. I have, in good faith and with complete judicial humility, invited writ review each time but so far none has been taken.

Another related *Humphrey* omission that requires a legislative or constitutional response is the serial offender, one who commits repeated crimes against a victim(s) while out on OR, supervision, or money bail in an ongoing case(s). There is simply no judicially sanctioned process of pretrial release that a community should have to or will tolerate when an individual is going down their neighborhood, sawing off as many of the neighbor’s catalytic converters as he can, is arrested with probable cause, and whether released on OR, supervision, or the payment of money bail, does it again the next night. Everybody in the courtroom, including his own lawyer, knows that if he is released under any circumstances that does not incapacitate his conduct, he’s likely to do it again. There is nothing about stealing a catalytic converter that comes near to what is now narrowly defined in Article I, Sec. 12 but I believe that the very integrity of the judicial system itself is at risk if he is "admitted to bail" only to victimize the neighbor living next door. If, after considering any less restrictive means, I do not incapacitate his predictable conduct and detain him until his serial guilt is either determined or admitted and he is subsequently held accountable for his conduct, the electorate is reasonable to expect another judge to replace me who will.

[1] Similar findings are presented in a recent report by Silicon Valley De-Bug, https://www.siliconvalleydebug.org/stories/discord-inaction-bail-and-detention-decisions-one-year-after-humphrey

Last, left unresolved by *Humphrey* remains the only circumstance that a fair and just judicial system should even consider any kind of monetary deposit or equivalent as a condition of pretrial release. A felony pretrial judge is faced with the relatively infrequent, but regularly occurring scenario where, after holding a hearing, it is clear that because of a combination of potential flight risk considerations (it is essential that genuine flight risk not be confused with the otherwise ubiquitous missed court appearance or FTA) someone facing a very large potential state prison sentence if convicted, who has little connection or incentive to remain in the community, presents an unreasonable risk to flee prosecution unless he or she deposits the proverbial deed to the ranch which will be returned in its entirety when the case is concluded.

Presently irreconcilable in these circumstances is, after following the directives of *Humphrey*, a judge properly inquires into the affordability of an amount the individual can deposit and is told, “Nothing.” I do not believe it is judicially responsible to chase one's "affordable bail” in these infrequent circumstances down to $0 and judges are currently left with only two unacceptable choices: countenance the measurable flight risk of a charged defendant facing substantial punishment if convicted or making the same kind of unaffordable bail order that was made by the *Humphrey* trial court and later reversed as unconstitutional.

Recommendations
In summary,

- Secs. 12 and 28(f)(3) should be reconciled and combined:
    - Overcoming a presumption of pretrial release on individualized conditions should be limited to a narrow and specific set of defined crimes and circumstances. Presently, only "capital cases" are specifically identified in Sec. 12 as supporting a presumptive detain order but why, for example, specify detention for those charged with murder but not for those charged with attempted murder? Isn’t the second individual presumptively more dangerous if released to finish off the only eyewitness to the crime?
    - The prosecution should have to carry the burden of proof by clear and convincing admissible evidence that no less restrictive means other than detention would reasonably assure victim and community safety.
    - The burden should shift for those charged with committing a crime that involves a victim or threat to a victim while already out on OR, supervised release, or money bail if guilt is established to be likely and the charged conduct is substantially similar to the prior charged crime(s).
- A fully refundable financial deposit of effective amount or kind can only be required to be made to the court upon a judicial finding that a charged individual would pose an unreasonable risk of flight to avoid prosecution if released on any less restrictive conditions.

Exhibit E

Hon. George Eskin (Ret.)

The Purpose of Bail. The original purpose of bail was to provide a method of release from custody and the cash bail system has evolved into a method for detaining defendants in custody. **Recommendations:** The Penal Code should state the purpose of bail, and the Judicial Council should be required to adopt a rational statewide bail schedule that accomplishes its purpose and eliminates the current arbitrary disparities. There is no rational justification for one county to prescribe $250,000 bail for a charge of aggravated assault while another county requires bail in the amount of $75,000 for the same offense.

Felony v. Misdemeanor. Before enactment of the California Public Safety Realignment Act of 2011 (AB 109), a felony offense was defined by potential incarceration in state prison. This simplification assisted public understanding of the differentiation between felonies and misdemeanors. The introduction of multiple consecutive sentences to county jail eliminated this easily discernable distinction. Risk-averse judges face a quandary when they consider pre-trial release from custody of defendants charged with misdemeanor domestic violence offenses who have threatened the lives of their alleged victims.
Recommendation: Define a felony offense as one which presents the potential punishment of a state prison commitment, recognizing the most serious consequence for crimes of physical, psychological and financial violence.

Bench Warrant Process. Defendants arrested on bench warrants are calendared too quickly for pretrial services agencies to prepare a report, and this produces several disparities. Some defendants plead "guilty" or "no contest" to be released from custody without realizing they could be released on pretrial supervision; others are detained without referral for pretrial supervision and remain in custody longer than necessary because the warrant appearance timeline interfered with the "normal process". Many people who could be released promptly remain in custody and lose employment and housing**.**
Recommendation: Ensure that defendants arrested on a warrant have the same opportunity for a pretrial release assessment as early as possible in the process.

Pretrial Services Funding. There is a wide variation in the delivery of pretrial release supervision services throughout the state. The Pretrial Pilot Project sites have significantly more robust programs than those in "non-pilot" counties, and a basic funding level should be established to achieve a more equitable process. All counties should have a basic complement of pretrial services to offer as an alternative to the disparities created by the bail system.
Recommendation: Prescribe release from custody when there are non-monetary options that address public safety concerns. The Legislature should establish consistent standards promotic holistic services that allow more equitable treatment for disadvantaged populations.

Pre-Conviction Incarceration. Despite the significant reduction in the number of county jail inmates as a result of various public health measures adopted in response to the Covid-19 pandemic, the overwhelming majority of the inmate population throughout the state consists of persons who are serving their future sentences before they are convicted and will be released from custody with "credit for time served" within a year. A small percentage of the county jail inmate population will be sentenced to state prison.
Recommendation: Prescribe early disposition incentives.

Inadequacy of Holistic Programs. Superior Court criminal calendars are laden with cases involving defendants who are homeless, unemployed, suffering from mental illness and drug dependency, and facing multiple charges of trespass, public intoxication, petty theft and possession of narcotics paraphernalia. A variety of supervised release (from custody) programs has been initiated, but treatment and other therapeutic resources are woefully inadequate. **Recommendation:** Encourage local governments to fund holistic programs.

Exhibit F

Tiffanie Synnott

Sacramento Public Defender's Office

Recommendations for Quality Bail Hearings

Respectfully submitted: Tiffanie Leon Synnott, PTSP Co-founder, Bar# 215376

The primary goals of California's current bail hearings are to protect public safety and to ensure an individual's return to court.[1] Statute specifies several factors for the court to consider when setting bail.[2] These factors fail to reflect due process and secure equal protection. As a result, our state is plagued with mass incarceration of individuals awaiting trial, pronounced racial disparities within our jails, and a growing proportion of incarcerated individuals who are unhoused and/or mentally ill. A re-imagined approach to pretrial and bail hearings requires revisions to our current Penal Code to ensure quality bail hearings that meet the state's goals and guarantee individuals their constitutional rights to bail, due process, presumption of innocence, and equal protection.

This brief describes a successful model for pretrial proceedings and offers several recommendations and remedies to support higher quality bail hearings. The brief is organized as follows:

— — —

I. Reimagined Approach to Pretrial: Sacramento County Public Defender Pretrial Support Project (PTSP)

Since 2020, the Sacramento County Public Defender's Office has implemented an innovative approach to pretrial and bail hearings, anchored in holistic defense. The project raises the standard of public safety using a public health approach. This new approach supports due process through quality bail hearings and can serve as a model throughout the state to achieve better outcomes, secure public safety, and ensure individuals' return to court. The Sacramento County Public Defender, in partnership with all justice partners, the county Department of Behavioral Health, and community organizations that work in the criminal-legal system, implemented this approach and has shown positive outcomes. This approach supports a quality bail hearing, saves the county money, reduces incarceration, affirms public safety, and repairs lives. Recognized in 2020 by the California State Association of Counties with a challenge Merit Award, the Sacramento County Pretrial Support Project (PTSP) brings a holistic approach to pretrial services that is client centered with an emphasis on mental health, housing, substance use, and equity.

[1] Cal. Const., art. I, §§ 12, 28, subd. (f)(3); Pen. Code, § 1275, subd. (a)(1)

[2] Ibid.

Key components of the program include (1) notice to the Public Defender when an individual is booked into custody and (2) incarcerated individuals' early access to a public defender or indigent defense provider prior to arraignment. These two components allow PTSP personnel to conduct an interview-based needs assessment that encompass four evidence-based tools: ACES (trauma), CAGE-AID (Substance Use), HSCR (Homelessness Screener), and Brief Jail Mental Health Screen. Using a holistic defense approach, legal interns interview individuals in custody prior to arraignment to assess their needs. These individuals are linked to social workers in the Public Defender's office, who coordinate safe discharge plans with the Courts, Correctional Health, Department of Behavioral Health, community organizations, and other agencies to ensure linkages, housing, transportation, and supportive services are in place upon discharge. Individuals are also identified for diversion and collaborative court programs to secure early engagement. Recognizing the need for continued support and case management upon discharge, individuals are provided Community Intervention Workers and a Public Defender Social Worker while on pretrial release. All these connections are made while the client remains under the protections of the public defender's legal umbrella, to protect the client's right to aid in their defense and not self-incriminate.

Over the past 18 months, PTSP has assessed 2,808 individuals in custody and has found that about 81% of those assessed have required social worker support, 57% needed mental health support, 44% needed substance use and prevention support (SUPT), and 54% needed housing support. Through this program, we have linked/referred: 786 to mental health, 501 to SUPT, and 474 to housing. With PTSP defense attorneys can advocate in court for alternatives to incarceration consistent with the Supreme Court finding in *In Re Humphrey*. This approach redefines "Public Safety" to include public health while addressing health equity. As directed in 2021 SB 129, Sacramento County does offer traditional supervised release through probation. However, PTSP interrupts the revolving jail door by expanding the definition of public safety to recognize underlying root causes of incarceration and reincarceration. PTSP preserves a person's right to aid in their defense and not self-incriminate, while addressing health, social service, and other basic needs. This increases protections and achieves successful outcomes for clients, county departments, and residents.

II. Recommendations and Remedies to Support Higher Quality Bail Hearings

<u>Proposed Revisions to the Penal Code</u>

1) **Create clear legal standards for process, evidence, and burden of proof**

The Penal Code must indicate clear legal standards regarding process, evidence, and the burden of proof. Our current Penal Code fails to incorporate the legal processes set forth with *In Re White* (2020) 9 Cal.5th 455, *In Re Harris* (2021) 71 Cal.App.5th 1085, and *In Re Humphrey* (2021) 11 Cal.5th 135. This confusion is layered with the failure to reconcile Article 1, Section 12 with Article 1, Section 28. Further discrepancies exist between the quality and type of evidence that may be offered. Despite case law and Article 1, Section 12 indicating a "clear and convincing" standard of proof; the Penal Code remains relatively silent.

Rebuilding our current bail hearing process towards a quality bail hearing require clear legal standards for process, evidence, and burden of proof. A Penal Code which embraces a presumption of release upholds due process and protects equal protection. Evidence used to infringe on a person's liberty interest should be the same quality of evidence mandated by the appellate review in *In Re White* and be reasonable, credible and solid. *Id*. at 463. Likewise, in order to deny release, the burden should be on the prosecutor to prove by clear and convincing evidence that there is a present danger and no other alternative exist to protect public safety and secure appearance in court. Ideally, the standard of review for bail hearings should be de novo based upon the constitutionality of the liberty interest at stake. Anything less will only lead to continued mass incarceration and further racial disparities.

2) **Implement Incremental changes in due process**

   a) **Modify notification standards to the public defender or indigent defense provider, and**

b) Require early access for defense attorneys to detained individuals prior to arraignment

To ensure equal protection and due process, the Public Defender or indigent defense provider should be notified within two hours after an individual is booked into custody and should have early access to the individual prior to arraignment.

Equal protection: Typically, a detained individual who can afford to post bail will do so prior to arraignment. In contrast, a detained individual who cannot afford to post bail can remain in custody for up to three days pending arraignment and bail hearings. Early notification of the defense provider could reduce this disparity.

The existing disparity is an inherent violation of equal protection. Making matters worse, this disparate treatment serves to exacerbate income inequality and racial inequity. California already had among the highest income gaps in the country in 2020, and the COVID pandemic has expanded this gap.[3] People who work in low wage jobs–who are disproportionately Black and Latino–are less likely to have the flexibility to miss work without losing their jobs, or to find alternative employment if they lose their jobs due to detention.

A two-hour notification timeline would be consistent with AB 2644, signed into law on September 13, 2022. The new law requires Probation to notify the Public Defender or indigent defense provider within two hours of booking a youth into a juvenile youth detention center.

Due process: The Sixth Amendment guarantees criminal defendants the right to a fair trial, including the right to know the nature of their charges and to prepare for court. *In Re Humphrey* requires that an analysis of an individual's ability to pay be made at a bail hearing.

Current practice in most jurisdictions addresses bail, the ability to pay bail, and the appointment of an attorney for indigent individuals all at the time of arraignment. This practice gives a detained individuals only a few seconds (usually standing in a human cage in open court) to provide their attorney with the information needed to address bail and *Humphrey* requirements, depriving the individual of the opportunity to be properly advised of the charges against them, prepare for the bail hearing, and establish their ability to pay.

Both issues–notice and access to public defenders or other indigent defense providers–can be addressed by adding a sentence to the end of Penal Code Section 1269b(a), as recommended below.

> Penal Code Section 1269b (a) *Notice shall be given to the Public Defender or indigent defense provider within two hours of booking. The Public Defender or indigent defense provider shall have access to all individuals who have not hired an attorney prior to arraignment*.

c) Strike speculative language and require the prosecution to present specific articulable facts (as a minimum standard)

Speculative evidence is not permitted under the rules of evidence because it is unreliable. However, our current statutes governing bail require our court to make a finding regarding detention and bail based on speculation. This structure 1) inherently violates due process, and 2) shifts the burden and accountability to the bench to make a finding of detention contrary to the rules of evidence. A standard of speculation is so low that it unfairly burdens the court; and it is in the court's self-interest to err on the side of unjust remand. By striking language in current statutes that is speculative and requiring the prosecutor to present specific articulable facts, California will move toward higher quality bail hearings.

d) Compel a finding of willful failures to appear

Likewise, our current statutes require the court to consider prior failures to appear when determining bail. Legally, failure to appear requires a willful failure. However, unlike prior convictions, an analysis of failure to appear often

[3] https://www.ppic.org/publication/income-inequality-in-california/

includes all instances when the individual allegedly did not appear in court, rather than the legal finding that a failure to appear was in fact willful. Equal protection and due process demand that indigent individuals who may have a more difficult time appearing timely in court not be judged without evidence of a willful failure to appear.

e) Provide proof of residence beyond a verified legal address of one year

Further equal protection concerns exist when evaluating Penal Code section 1318.1 which allows the court to consider written verification of the residence of the defendant during the past year when determining release. This provision allows housing secure individuals to be released, while unhoused individuals remain incarcerated. Below are recommended revisions to Penal Code. Additional words are added in italic.

Penal Code Section 1270.1 (c): At the hearing, the court shall consider evidence of past *willful failure to appear in* court appearances of the detained person, the maximum ~~potential~~ sentence ~~that could be imposed~~ *for the charges*, and the *present* danger ~~that may be posed~~ to other persons if they are released. *The prosecutor shall articulate specific facts supporting what persons they believe are in present danger if the individual is released*……In making the determination whether to release the detained person on his or her own recognizance, the court shall consider the ~~potential~~ *present* danger to other persons….

3) Expand permissible factors that substantively change findings of determining bail
- **a) *In Re Humphrey (2021) 11 Cal 5th 135*,**
- **b) Prepare and assist in the defense,**
- **c) Alternatives to incarceration, and**
- **d) Collateral consequences of a detention**

Our current bail statutes primarily focus on six factors including protection of the public, seriousness of the offense charged, previous criminal record, failure to appear/probability of securing an appearance in court, any alleged injury/threat to victim or witness, warrants, "potential" danger to "public safety", and written verification of the individual's residence within one year. Although the court shall consider the detained person's ties to community and their ability to pay in determining whether to release someone on their own recognizance pursuant to Penal Code Section 1270.1, these additional factors are limited to Penal Code Section 1270.1 and the code fails to meet due process and equal protection. A quality bail hearing, equity, and justice require expanding the matters considered to include 1) *In re Humphrey*, 2) *prepare and assist in the defense*, 3) alternatives to incarceration under a holistic defense approach, and 4) collateral consequence of a detention.

In Re Humphrey, (2021) 11 Cal.5th 135

The California Supreme Court found in *Humphrey* that detaining a person pretrial solely because they cannot afford bail violates due process and equal protection. The Court further held that California Courts must consider ability to pay when setting bail and courts cannot set unaffordable bail that would result in pretrial detention unless there is clear and convincing evidence that no other condition would reasonably protect public safety and ensure court appearances. To ensure *Humphrey* is followed, revisions to the current Penal Code need to require the court to consider 1) the individual's ability to pay, and 2) what other least restrictive alternatives outside of detention exist that would protect public safety and ensure court appearances. The Penal Code should also list some least restrictive factors that could be considered consistent with *Humphrey* including mental health, substance use, stay away orders, social supports, and linkage to services.

Prepare and Assist in their defense

A right to a fair trial fundamentally encompasses a person's ability to aid in their defense. In *Stack v. Boyle*, (1951) 342 U.S. 1, 4, the United States Supreme Court found that pretrial release "permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." In *Boyle*, the court recognized that

preparation for the defense necessitates pretrial release. *Id.* Yet, California's current Penal Code fails to allow the court to consider how an individual's detention impacts their ability to prepare and assist in their defense. This sixth amendment right, due process, equal protection, and the United States Supreme Court's decision in *Boyles* demand that our current Penal Code be revised to include, as a factor to determine release, whether continued detention would hamper preparation of a defense.

Alternatives to incarceration

In Re Humphrey constitutionally requires the court to consider the least restrictive alternative to bail that satisfies the government's compelling interest to protect the public and ensure the individual appears in court. To meet *Humphrey's* standard, an individual needs assessment, such as the interview-based assessment modeled in PTSP, must be conducted with the individual to develop a least restrictive alternative plan and the defense must advocate for this plan. Further, the Penal Code needs to reframe public safety to include a public health and equity approach. This would permit the court to consider an individual's specific needs, approve safe coordinated discharge plans, and support linkage to services as a valid alternative to incarceration.

The development of and advocacy for any least restrictive alternative must occur under the umbrella of the defense to ensure due process and preserve the right against self-incrimination. This holistic defense approach has been shown to reduce incarceration without harming public safety.[4] In addition to meeting *Humphrey's* standards and protecting due process, statutorily requiring the defense to identify, coordinate and advocate any least restrictive alternative would also address equal protection. Wealthy individuals can often afford to have their defense develop and secure an alternative to incarceration such as placement in a residential rehabilitation center, while indigent individuals are more likely to remain in custody.

Impact to "public safety" as a result of the collateral consequence of detention

The collateral consequences of detention impact public safety. By remaining in custody, individuals may lose their employment, housing, social service supports, vocational opportunities, medical coverage, and custodial status of their children and/or dependents. Continued incarceration can result in significant trauma and impact an individual's mental health and ability to aid in their defense. The impact of these collateral consequences is not limited to the individual in custody. It also affects their families, friends, employer, schools, and our entire community. Yet, the current Penal Code sections governing bail do not allow for the courts to consider any of these collateral consequences. Despite the theoretical presumption of innocence, our current Penal Code fails to consider the harmful collateral consequences an individual suffers from being detained. A quality bail hearing requires Penal Code revisions to allow the court to hear evidence on how continued incarceration will impact the individual, their family and our community when deciding bail.

III. Summary

Penal Code Revisions are necessary to meet the constitutional standards of due process, equal protection and ensure quality bail hearings. Changing the burden of court speculation based on historical evidence to a minimum standard requiring articulable facts that substantiate present danger will move us toward fairness. Redefining "public safety" to include public health, consideration of collateral consequences and the use of holistic defense as a vehicle to help identify needs of individuals in custody and create plans for alternatives to incarceration will provide the state with better outcomes and guarantee the due process and equal protection rights of the individual facing the criminal justice system. This shift is possible, as demonstrated by the successful outcomes of the Sacramento County Public Defender's PTSP. With full collaboration among all justice partners and social service agencies, together we can move towards the common goal of public safety.

[4] Harvard Law Review, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 Har.L.Rev. 819 (2019)

Exhibit G

Bill Armstrong

California Bail Agents Association

Remarks on the California Bail System

William Armstrong, President
California Bail Agents Association

Over the past five years several attempts have been made to reform California's bail system through the legislative process. None of these attempts were successful until the 2021 California Supreme court decision in *In re Humphrey* (2021) 11 Cal.5th 135 (hereafter "*Humphrey*"). These remarks will explain why further changes are unnecessary.

1. **Why legislative attempts to reform the bail system failed.**

Beginning with the introduction of SB 10 in 2017, there have been several legislative attempts to reform the bail system in California. However, these bills went too far and attempted to reduce accountability in the criminal justice system by eliminating bail and replacing it with a zero bail pretrial release system.

We know zero bail policies are a failure because of data produced when zero bail was enacted during the COVID-19 pandemic.

According to the Sacramento County District Attorney's Office:

> "Based on data from both the Sheriff's Department and the Sacramento Superior Court, it is estimated that 5,100 individuals have been released on zero bail/OR from March 18, 2020, through September 1, 2021. Of those released, over 1,700 individuals have been re-arrested after release. Some have been re-arrested and released multiple times, including individuals re-arrested and released over 10 times. The total number of re-arrests is over 4,400." (September 10, 2021, *Public Information on Zero Bail*, https://www.sacda.org/2021/09/public-information-on-zero-bail/).

Similar results were found in Yolo County:

> "District Attorney Jeff Reisig stated: 'When over 70% of the people released under mandated $0 bail policies go on to commit additional crime(s), including violent offenses such as robbery and murder, there is simply no rational public safety-related basis to continue such a practice post-pandemic, especially in light of the increasing violent crime rates across California.'" (August 22, 2022, *70% of Those Released on $0 Bail Commit New Crimes*, https://yoloda.org/70-of-those-released-on-0-bail-commit-new-crimes/).

Furthermore in 2020, voters rejected the elimination of bail in California when they defeated Proposition 25, a referendum which repealed SB 10. The vote wasn't close as Proposition 25 was defeated with 56.41% of voters voting NO. This is despite the fact that supporters of Proposition 25 spent approximately $15 million, while opponents spent only $10 million (approximately) in opposition.[1]

2. **No further change to bail law is needed because *Humphrey* strikes a reasonable balance between the right of the accused to be free pretrial and the right of society to be protected from dangerous suspects.**

[1]https://ballotpedia.org/California_Proposition_25,_Replace_Cash_Bail_with_Risk_Assessments_Referendum_(2020)

The *Humphrey* decision requires trial courts to hold a hearing with 48 hours of the defendants arrest to consider the defendants ability to pay bail and whether other, less restrictive means, can be used to safely release the defendant.

However, the court can deny OR release and set an unaffordable bail if they find by clear and convincing evidence that the defendant's release would be a danger to the safety of the public or the victim. These are the primary factors the court considers when setting, reducing or denying bail.

The court must also consider the seriousness of the charged offense, the defendant's previous criminal record and history of compliance with court orders, and the likelihood that the defendant will appear at future court proceedings. (*Humphrey, supra* 11 Cal.5th at p. 152-153).

Social justice issues have been resolved by *Humphrey* because that decision requires trial courts to consider a defendants ability to pay when setting bail. It can no longer be said that pretrial defendants are languishing in jail merely because they cannot afford bail. Under *Humphrey,* the trial court has held a bail hearing in which these defendants were found by clear and convincing to be too dangerous to release on an affordable bail.

Furthermore, a defendant may be able pay an "unaffordable" bail by asking friends and relatives to pay the bail agent and cosign on his bail bond. The bail agent will do a better job than pretrial programs in making sure the defendant appears for trial. The bail agent has a financial interest in making the defendant appear and Penal Code sections 1300 and 1301 allow the bail agent to arrest a fugitive defendant and return him to court for trial. The defendant's friends and family who cosigned the bail bond, also have a financial incentive to help the bail agent locate and return the defendant to court. Pretrial programs do not benefit from these incentives.

Zero bail pretrial release programs make it very difficult for crime victims to come forward knowing that their assailant will be back on the streets within hours of being arrested. Without a monetary incentive to appear at court dates, many victims will never receive justice.

Conclusion.
Humphrey was decided in 2021 and there are few published cases examining the contours of its new bail requirements. The courts need a few more years to digest *Humphrey* and legislation enacted prior to that would be premature.

Thank you for your consideration in this matter.

Sincerely,

William Armstrong, President
California Bail Agents Association

Exhibit H

Jeffrey Clayton

American Bail Coalition

AMERICAN BAIL COALITION

ABC BRIEFING DOCUMENT
info@ambailcoalition.org
www.AmBailCoalition.org

Briefing Document: Thoughts on Bail and Bail Reform in California

Before the California Committee on Revision of the Penal Code

October 5, 2022

Dear Committee Members:

The American Bail Coalition is a national trade association of surety insurance companies, most of which are corporate citizens of California. Surety insurers are underwriters of the surety bonds written by California licensed bail agents and must comply with the various statutes and regulations pertaining to the business of insurance in California.

As a national expert, I am writing to provide my thoughts on bail and bail reform in California as part of the Committee's work in examining California's bail system and in making recommendations to the legislature to improve the bail system. Certainly, there are many improvements that can be made as we note below.

Preventative Detention

The expansion of preventative detention is a key decision point for the Committee, and one we stand firmly against.[1] Justice Marshall's dissent in *United States v. Salerno*[2] is our basis, as is Judge Amalia Kearse's majority opinion holding the Federal Bail Reform Act of 1984 unconstitutional.[3] Indeed, it is beyond dispute Chief Justice Stuart Rabner's new system in New Jersey took a constitutional change to implement, in addition to a hefty price tag. The same would be true of California—to "end cash bail" or to eliminate bail as a concept and go to a model of detaining who we want and releasing everyone else on zero bail would take a constitutional change. The right to bail by sufficient sureties also includes the right of the People to challenge the sufficiency thereof as well. The California Constitution provides that all persons are "bailable by sufficient sureties." To go to the New Jersey or federal model would require the deletion of such language. In fact, bail by sufficient sureties was in the federal Judiciary Act of 1789, and was deleted as part of the Bail Reform Act of 1984.[4]

[1] We have obviously been having the debate over preventative detention for several years, and there is every reason to believe, as in New Jersey and the federal system, that the creep of preventative detention will over time render the right to "pretrial release" a myth more than a reality. New Jersey has more than doubled motions for preventative detention since implementation, and there are continuing legislative calls to add more charges to the detention list. This article presents the arguments against preventative detention model in California:

[2] https://supreme.justia.com/cases/federal/us/481/739/

[3] https://casetext.com/case/united-states-v-salerno-6

[4] The issue of preventative detention in California was not necessarily a closed question at the time of the passage of SB 10 in 2018, which was ultimately rejected by the voters. As part of the *Humphrey* case, the Attorney General took the position that Section 28 of Article I over-ruled the guarantee of bail by sufficient sureties, the end result of which would be the General Assembly, with the consent of the Governor, would then have the power to define which crimes or circumstances a prosecutor may seek detention and thus implement the no money bail system of

The second point is that California has already reformed its system in a manner that already captured the benefits New Jersey achieved from its reforms. Prior to the reforms, New Jersey relied heavily on misdemeanor arrest and bail. Since the reforms, New Jersey has gone largely to the citation model rather than arrest for low-level felonies and misdemeanors. California has already done this over time, resulting in very little misdemeanor bail in California. In addition, there is widespread use of citations by California's law enforcement officers. New Jersey's published results, flow almost solely from non-arrest and citation policies (even prior to bail reform), not the fancy new model of preventative detention, i.e., the ability to deny bail. In fact, racial disparities of those incarcerated pretrial on indictable offenses (felonies) have increased since implementation.[5]

The California Constitution is also very specific as to the factors that are mandatory considerations for bail (and indeed, the *only* considerations). In addition, there is no residual clause, which means the legislature and judges have power to only consider the specifically enumerated constitutional factors. The original California Constitutional provision in fact did not contain the additional or mandatory factors for judges to consider when setting bail and had merely the charge to bail set by sufficient sureties (and look to the common law factors that pertain thereto). In 1994, the constitution was amended to include the specific factors that are contained in Section 12 of Article I: "In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case."

The passage of Proposition 9 in 2008 is a key legal point in time in the history of bail in California—the addition of required consideration of "dangerousness" or "public safety" in general, meaning we are not going to get into the business of predicting future criminal behavior, something Judge Kearse correctly felt was a concept that cannot coexist with the due process clause, and which *was not allowed in California* from 1849 until 2008. Bail was about appearance, not what you may do in the future. And this is important because the argument is that bail is used today as a *sub rosa* preventative detention mechanism premised nearly entirely on fears of future criminal behavior. Of course, Judge Kearse and Justice Thurgood Marshall, being fully aware of the alleged evils of monetary bail, rejected the concept that in order to fix that problem, we are going to permit and codify preventative detention as a replacement for *sub rosa* detention. That was simply a constitutional bridge too far. Instead, it would be better to focus on the heart of that issue: using future predictions of criminal behavior to set bail higher, which then results in detention. That was something the founders never contemplated as being something that would be allowed—the same founders who wrote both the Judiciary Act of 1789 (all persons bailable by sufficient sureties), the Northwest Ordinance, and the Eighth Amendment. That was simply antithetical to their understanding the right to bail.

New Jersey. The California Supreme Court squarely rejected this argument in *Humphrey*, holding that Article 12 trumps the language in Article 28, and thus SB 10 ultimately would have been held unconstitutional by purporting to legislatively expand the categories for which detention may be sought.

[5] https://www.njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=sT7

So, while judges were constitutionally required to consider the "previous" criminal record of the defendant, they were not permitted until 2008 to get into the business of mixing bail setting with future dangerousness predictions. Bail was in California up until 2008 as it always was—and what the Supreme Court said in *Stack*—set an amount reasonably calculated to ensure the *appearance* of the defendant in court. The defendant's prior record was understood as bearing on his appearance—will the defendant appear to face the charges in light of possible sentencing implications of the past record, and does the prior record contain charges related to bail jumping or being a fugitive from justice. Not, he has a record a mile long, and I have a feeling he's going to do it again. This is also the settled law in New York.

In 2008, that all changed. California was not unique. Most states allow for consideration of public safety, and I estimate that to be roughly 45 states. There is a major issue concerning that in Ohio right now, with a proposal on the ballot to make public safety an explicit factor after the Ohio Supreme Court ruled it is not a proper consideration.

Importantly, however, protection of public safety was never much a factor at all in this country until the 1980s and the move toward preventative detention. Many states added a future dangerousness prediction to bail by sufficient sureties and the concept of excessive bail, but nearly all of those occurred during or after the 1980s. But that was never part of our constitutional tradition, as Judge Kearse noted. Capital cases were detained, all else got bail by sufficient sureties. That is the American tradition. That is why the Supreme Court in 1951 in *Stack* never mentions public safety—there is no language saying that bail should be "reasonably calculated" to protect the safety of the public. The purpose of bail then was *only to guarantee the appearance of the defendant*.[6] Of course, as many commentators note, the death penalty was a lot more expansive, and as perceptions have changed over the centuries, the number of detainable offenses defined as capital offenses has quite dramatically shrunk. But, the death penalty or a life sentence *was the measure* of when bail could be denied altogether. After *Salerno*, most policy makers in states firmly believe they can detain all felonies, a proposition that I seriously doubt would have gotten a majority of the justices to vote in favor in 1987, or a majority of the justices today.

In 2008, Article I, Section 28 became law, and added several factors to the bail setting considerations, which in essence allow outright predictions of future dangerousness to inform the setting of bail by sufficient sureties. Courts have been required since 2008 to consider "the safety of the victim and the victim's family considered in fixing the amount of bail." Ostensibly, this asks the question of whether the charged individual is going to do it again. In addition, the factors gave specific weight to one factor, public safety, by requiring judges to consider "the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. **Public safety and the safety of the victim shall be the primary considerations**."

Thus, prior to 2008, judges were not allowed to get into the future dangerousness predicting business—now they are specifically required to make that the primary consideration in setting bail, with appearance in court then becoming a mere secondary consideration.

[6] https://supreme.justia.com/cases/federal/us/342/1/

We note the same argument goes on in New York, with Mayor Eric Adams recently saying we need a "dangerousness standard." And yet, New York has *never* allowed future dangerousness to inform bail, and has limited preventative detention. Prior to bail reform, things were working well without dangerousness or the expansion of preventative detention. There is just no need for it. Bail is best understood as an appearance bond, and when we go beyond its purpose and try to explicitly use it to deter future dangerousness, the walls come crashing in on two fronts: (1) the system is accused of being one of *sub rosa* detention for those who don't get out because their bond is beyond their reach due to judicial fears of new criminal behavior; or, (2) Chief Justice Rabner comes in to California and argues that the sacred right to bail that dates back nearly 800 years should be cast aside in favor of outright preventative detention, i.e., being more "honest" and perhaps "direct" about the fact that we want to lock up people based on future dangerousness predictions (by way of computer algorithm).

Indeed, Chief Justice Rabner stands alone as the key national advocate of expanding Justice Rehnquist's wrongfully decided *Salerno* decision throughout the country. Of course, many a reformer will quote from *Salerno*, "Liberty is the norm" as somehow being a comment in favor of bail reform, while not realizing that there was a 24% pretrial detention rate in the federal system in 1983 when there was monetary bail and bail agents, as a result of the decision in *Salerno*, is now hovering around 75% pretrial detention rate when there is no right to monetary bail by sufficient sureties or bail agents. Indeed, *detention is the norm*. If it worked, which there is no evidence it did, it certainly had a cost in terms of mass pretrial incarceration.

At the end of the day, all of this is nonsense. Judges have and judges do protect public safety by making sure those released are going to come back and face justice quickly. Deterrence of crime clearly rests on two principles: certainty of getting caught and swiftness but not length of the punishment.[7] Rather than arguing that bail by sufficient sureties is the problem, it is better to view the constitution as having created a bridge to *sub rosa* detention that is 100% the reason there is pressure to outright make it lawful, when in fact the opposite should be true. The bail industry, and personal sureties, etc., functioned quite well dating back to the Old Lady on Kearney Street in 1879, since the regulation of bail agents in California in the late 1930s, and certainly long before the future dangerousness business became not only a consideration but the "primary consideration." Bail agents co-existed quite well without any of this nonsense. In fact, the bail industry joined the ACLU and Professor Freed in opposing the Bail Reform Act of 1984, with Justice Marshall's words ringing true, that the decision by the majority in *Salerno* to uphold the Bail Reform Act of 1984 was one that would "go forth without authority, and come back without respect." Upon that point, there is now zero doubt.

If indeed *sub rosa* detention based on future dangerousness is constitutionally abhorrent, then attack that problem and have the courage to amend Section 28 of the Constitution. Of course, then you'll be painted as *de facto* against public safety. I disagree. In reality, we never needed preventative detention (or *sub rosa* detention based on predictions of future dangerousness) until we convinced ourselves that we did need it. We ignored 800 years of history, and let then-Chief Justice Rehnquist launch this new movement of preventative detention, something that then-US Attorney General Edward Meese admitted a few years ago on a panel I was on at the Heritage Foundation, actually went way beyond

[7] https://nij.ojp.gov/topics/articles/five-things-about-deterrence

what was ever intended. We also watched states expand considerations of public safety for purposes of setting monetary bail. We simply just assumed this was the law, when in fact, it never was. This despite the fact that no one can accurately predict future dangerousness to any degree of statistical significance as a matter of clinical or actuarial science.

As the learned Professor Daniel Freed told congress during the hearings leading up to the Bail Reform Act of 1984, *what do you know now that the founders didn't know then that suggests you are equipped to predict future criminal behavior to a constitutional certainty*?

Indeed, as Judge Kearse put it, "It would be constitutionally infirm, not for lack of procedural due process, but because the *total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause*. This means of promoting public safety would be beyond the constitutional pale. The system of criminal justice contemplated by the Due Process Clause — indeed, by all of the criminal justice guarantees of the Bill of Rights — is a system of announcing in statutes of adequate clarity what conduct is prohibited and then invoking the penalties of the law against those who have committed crimes. *The liberty protected under that system is premised on the accountability of free men and women for what they have done, not for what they may do. The Due Process Clause reflects the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes*."

Thus, Section 28 provides the firm constitutional directive to judges to achieve the very result Justice Rehnquist allowed the federal government to do in 1984 but directly in a *sub rosa* fashion: setting of security which may result in detention based solely on fears of committing future crime. We agree *sub rosa* detention premised on such a concept is evil. We cannot support, however, an attempt to legitimize it by embracing the wrongly decided *Salerno* decision and attempting to codify that in the California Constitution. If the illegal backdoor is evil, why turn it into a legal front door?

Unsecured Bails

While there have been calls for more "zero bails" or calls for unsecured or partially secured bails in California, none meet constitutional scrutiny or meet scrutiny under any concept of a rational basis. First, prosecutors have a right to ask for bail by sufficient sureties, which is in essence a right to challenge the sufficiency thereof. No statute can remove that from judicial discretion and define sufficiency in a particular case. That is an inherent judicial power, with sufficiency being an exception.[8] Thus to enact a statute that defines zero as sufficient by discriminating based on the charge or other

[8] *See People v. Follette*, 240 P. 502, 520 (Cal. Dist. Ct. App. 1925) (stating that "[i]t is the duty of a magistrate, in accepting bail, to the very limit of his knowledge and in the exercise of the greatest care" to make sure that the bail posted is legal, the sureties are who they say they are, and that they can pay the full amount of the bail "in case the principal fails to comply with the conditions of said bond"); *People v. Davis*, 107 **N.Y.S.** 426, 428 (App. Div. 1907) ("It is clear... that the sufficiency of [a] surety is the subject of judicial inquiry."); *see also* State v. Briggs, 666 N.w.2d 573, 582 (Iowa 2003) (holding that the state constitution's *sufficient* sureties provision implies an ability to inquire and is consistent with the historical purpose of bail to assure a defendant's appearance in court (emphasis added)).

factors is unconstitutional as applied when the People can prove that it is insufficient. Regarding unsecured bails (promise to forfeit later), again this may deprive the right of the people to have the sufficient sureties. In addition, national data clearly shows that unsecured bails perform worse than release on own recognizance bonds, so if we are able to highlight which cases we think there should be unsecured bails, there is no reason then to not give them a release on personal recognizance.[9] Further, the unsecured portion of bail (the promised portion) is never collected, and when it is, it turns prosecutor's offices into bail collection agencies, an undesired result. Thus, we think it is not best practices to go to unsecured bonds—we should have secured bonds or release on recognizance.

While the problem of *sub rosa* detention based on future dangerousness remains a constitutional issue, the California Supreme Court in fact upheld it in the *Humphrey*[10] case. Of course, the court did say that there has to be a hearing where a prosecutor puts on some evidence at a heightened standard as to failing to appear in court or future dangerousness in order for the unposted bond to serve to detain. This is similar to what the Nevada Supreme Court decided as well in *Valdez-Jiminez.*[11] What does it mean? We don't know yet. The legislature has not defined it with particularity, despite Justice Cuéllar's clear invitation to do so in the majority opinion.[12] No cases have gone back up to the California Supreme Court on this point, and the General Assembly has failed to enact any procedures. As we have learned for the last seven years of federal and state litigation over this, what we are trying to guarantee is a meaningful, prompt opportunity to have a bail review hearing. Some states offer a *de novo* bail review hearing—in essence a retrial. Right to counsel issues also come into play. All this at the most critical time – How long must I wait to get in front of the judge to argue bail?

Speedy Review

This issue is now at a constitutional, generational cross-roads. In many states we say, 72 hours is the benchmark. In others, 24 hours. Denying the right to have a review quickly itself is the biggest problem we see around the country. Bail is excessive. Can't get a review. Get a review, bail is reduced, defendant is released. Defendant was thus incarcerated on an excessive bail. The late San Francisco Public Defender Jeff Adachi told me one time he started a bail appeal program, and was winning 1/3 of the time, and I remember thinking that is a lot of nights spent in jail on excessive bails when if we had an immediate hearing process *none of them* would have spent a single night in jail. At any rate,

[9] *See* https://bjs.ojp.gov/content/pub/pdf/prfdsc.pdf ("Predicted overall misconduct rates were higher for **unsecured bond (42%)** and emergency (56%) releases. This was also the case for rearrest and failure to appear rates. Property (17%), surety (20%), deposit (20%), and full cash (20%) bonds all had lower predicted failure-to-appear rates than **recognizance (24%).**"). Also, as to overall misconduct rates, the rate was 34% for recognizance bonds, compared to 42% for unsecured bonds. Thus, unsecured bonds perform the worst of all bonds except for emergency releases in all categories.

[10] https://www.courts.ca.gov/opinions/archive/S247278.PDF

[11] https://law.justia.com/cases/nevada/supreme-court/2020/76417.html

[12] "Accordingly, striking the proper balance between the government's interests and an individual's pretrial right to liberty requires a reasoned inquiry, careful consideration of the individual arrestee's circumstances, and fair procedures. But—as both parties emphasize—this is not a case that requires us to lay out comprehensive descriptions of every procedure by which bail determinations must be made. We leave such details to future cases."

administrative delays are costly to defendant rights. Remedying the problem is going to take investing in more prosecutors, judges, and defenders. But it is the right thing to do. There was a multi-year fight in my home State of Colorado over going from 72 hour to 48 hours to have a bail review hearing, which was primarily a question of resources and took several years to pass. Yet, Florida somehow does them all in 24 hours. Why set the bar so low? Why have people sitting in jail that, but for speedy and meaningful due process, would not be there. Research shows the damage that additional time in jail for causes to those that do not belong there—and that is caused in many instances by the systemic administrative malaise of the system that could be legislatively corrected. And it should be. That also goes for any other administrative delays that result in detention—they should be eliminated.

Need for Data Collection

For many years, national data was collected that allowed for the effectiveness of various forms of release to be measured. We would call on California to look at other data collection models and efforts from other states to truly measure the effectiveness of the system. Trend data that might help us understand the impact of various reforms that have occurred through 2000s, including perhaps the impact of the 2008 amendments and the use of pretrial services. In fact, Colorado requires statewide data reporting annually from pretrial services programs so that their effectiveness can be understood. We also think that some reporting on judges in terms of failing to appear rates and new crimes while on bail is appropriate, so that the public is aware of how judges are handling bail and whether it is working.

Effective of Pretrial Services Programs and Pre-Conviction Supervision

Turning now to another key issue—the supervision of defendants pending trial by county pretrial services agencies, which are an arm of the state, or by private vendors contracted by pretrial agencies or paid for directly by defendants. Of course, as we know, predictions of future dangerousness have, as the primary consideration, open the door to expanded and enlarged supervision of defendants since 2008. One commentator calls this e-carceration: electronic incarceration. Liberty is trammeled by such pretrial agencies, and of course, when someone fails they can have severe penalties inflicted up on them. Yet, we continue to hear such persons are “innocent” meaning they have not been convicted. And yet, we feel perfectly comfortable putting people on probation before conviction because, well, they are going to do it again. As Justice Marshall wrote in dissent in *Salerno*, the shortcuts we take with the innocent ultimately harm ourselves. This is an example of such a shortcut.

Aside from the liberty implications, are these pre-conviction supervision programs effective? Do they deter crime-committing behavior? Do they rehabilitate? The answer is no, they don’t. The reason is quite simple: they are punitive and part of the state prosecutorial dragnet but without the hammer of a conviction. Pretrial services, if it continues to exist, should be just that: services. We do not need to supervise defendants pre-conviction who have drug and alcohol problems—we need *services* to help them regardless of how many times they fail or what charges they are facing. Monitoring compliance of defendants to not drink or do drugs is a worthless enterprise when we lack the means to help them. So, the question is whether the current iteration of punitive-based pretrial services is worth it, and secondly whether removing pretrial services as part of the criminal prosecutorial dragnet is appropriate in favor of non-punitive models that are evidence-based and designed to get at addressing criminogenic factors

that lead to crime committing behavior. In other words, a county doesn't need a judge to order someone to provide pretrial services. If the services are available, and help defendants, they will use the services. And, of course, if that doesn't work, the stick of a conviction and threat of jail, prison and probation will get you all the punishment you need, but post-conviction when you can make it stick. Thus, if pre-conviction supervision works, I think someone should prove that up. I've never seen any evidence that it does. We also think the resources would be better spent on crime prevention, diversion, and treatment for co-occurring mental disorders.

Aside from these bigger picture issues, other legislative proposals in recent years have included looking at the stacking of charges on bails, where a defendant who has multiple charges is assigned separate bails for each charge. There have been various legislative attempts to look at this, including one attempt that would have reduced it with some exceptions. We often hear, why are bails so high in California, and that is a difficult question to answer. Nonetheless, it is one worth continuing to investigate. There have also been several conversations about having more uniform bail schedules in California. These are pre-set bails by which a defendant can avoid the unknown period of time to get a bail review hearing in California, and post bail now. There have been widespread criticisms of vastly different bail amounts on the various schedules. One legislative idea included a group of representative judges that could set a statewide bail schedule. There are probably legal issues there to grapple with, to wit, whether locally elected judges have the inherent power to set the bail schedule within their jurisdiction. Other ideas over the years have included the concept of bail schedule deviation reports, consideration of public or other comment during the annual review of the bail schedule, and other ideas to try to make the bail schedule process more uniform.

Conclusion

Bail is not perfect, but there are ample reasons to suggest that the alternative system of preventative detention is far worse. We often hear, bail does not protect public safety, an obvious shot on the issue of *sub* rosa detention based on dangerousness. But has the alternate system of New Jersey or federal system better protected public safety? I don't think so. The peak crime rate in modern times was 1993—almost a full decade after the operation of federal preventative detention. In fact, the per capita crime rate increased after 1984 and did not reach 1984 levels again until 1998. If preventative worked there's no evidence of that fact. In fact, in New Jersey, violent crime dropped the same rate per capita in the four years prior to bail reform as it did during the four years after bail reform. There were no big gains or drops in crime that were not otherwise occurring. The rate of violent crime in New Jersey is 1/3 today of what it was in 1990 (nearly all of which occurred while surety bail agents were in operation).

The fundamental question today is the same question posed when the conversation on bail reform started six years ago: is there a better alternative? In my view there is not. Banning something does not a solution make. But, as I pointed out, there are a myriad of potential policy or constitutional changes that could be argued as good public policy answers to a variety of these issues that indeed are major questions of civil rights, including procedural and substantive due process rights. In particular, the idea that we are going to let people sit in jail for multiple days without a bail review hearing and not take it seriously is a problem truly in search of a solution with the appropriate resources to back it up. The

criminal justice system indeed is a search for the truth, and if we do not have the courage to search for the truth, we will never find it.

I look forward to the committee's questions, and if I ever may be of further assistance, please do not hesitate to contact me.

DocuSigned by:
Jeffrey Clayton
45CB1FFA6278476...

Jeffrey Clayton, M.S., J.D.
Executive Director
American Bail Coalition
jeff@ambailcoalition.org

Exhibit I

Alison Shames & Matt Alsdorf

Center for Effective Public Policy

C E P P

Center for Effective Public Policy

Written Submission to the California Committee on Revision of the Penal Code

For the meeting being held on October 11, 2022

Submitted by:

Alison Shames
Director, Center for Effective Public Policy
Co-Director, Advancing Pretrial Policy and Practice
ashames@cepp.com

Matt Alsdorf
Associate Director, Center for Effective Public Policy
Co-Director, Advancing Pretrial Policy and Practice
malsdorf@cepp.com

Throughout our 40-year history, the Center for Effective Public Policy (CEPP) has been working to build a world where justice ensures strong, healthy communities for everyone. To accomplish this, we partner with teams from local, state, and tribal jurisdictions to improve their systems of justice and advance community well-being. We support teams that include diverse perspectives and voices, share our expertise and experience, promote research-informed and emerging promising practices, and facilitate equitable, systemic, and sustainable change.

In 2019, CEPP developed the Advancing Pretrial Policy and Research (APPR) initiative. APPR is a national resource center for the pretrial field, led by CEPP and funded by Arnold Ventures. Among other activities, the project: maintains a robust website featuring a variety of pretrial resources; hosts training sessions on pretrial justice; and provides technical assistance to over two dozen jurisdictions to help improve their pretrial systems. Notably, APPR is currently leading a six-part virtual training series for California pretrial practitioners, in partnership with the Chief Probation Officers of California and in collaboration with the Judicial Council of California.

We thank the Committee for inviting us to comment on issues relating to pretrial justice. Through our work with CEPP and APPR, as well as in our individual capacities prior to joining CEPP, we have worked

with dozens of jurisdictions on advancing pretrial improvements. Pertinent to this discussion, we are very familiar with the pretrial reform activities at the state level in Illinois, New Jersey, New Mexico, and New York, as well as the history of pretrial reform efforts in California. In addition, CEPP works with and has provided technical assistance to dozens of counties across the country on pretrial advancement. Translating statewide policy advancements to county-level practice improvements can be difficult–and it is something that very few states focus on, which inevitably leads to implementation challenges.

But California is taking a different approach, and we commend your recent efforts to fund and expand pretrial services through SB 129. One of the lessons we have learned is that it is important to build pretrial services before making additional changes to the system: If supportive services are not in place, it is more difficult to transition to a model in which pretrial results (such as appearance rates and arrest-free rates) are improved. You are already supporting efforts to build and strengthen those services, and we applaud your work.

In this written submission, we offer guidance based on the lessons CEPP has learned working at both the state level on statutory-based pretrial reform, and the local level on implementing improvements to policy and practice.

The considerations we recommend that you bear in mind are divided into two categories: (a) the substantive improvements California makes to its policies and practices; and (b) how you go about developing and implementing them.

Improvements to Policy and Practice

1. The pretrial system is vast and involves many agencies, and change is never easy. The APPR Roadmap for Pretrial Improvement includes a series of recommendations for policies and practices that conform to the law and best practices.

2. Start with the earliest points of justice-system contact in order to honor the presumption of innocence and the value of reducing or minimizing the harmful impact of justice-system involvement. For example, encourage the use of citation and release for lower-level charges (e.g., cite non-violent misdemeanors unless there is evident danger to a specific person(s)).

3. When it comes to pretrial detention, it is best to require judicial officers to make intentional decisions–rather than relying on financial conditions of release to determine whether or not someone remains in jail. Detention should occur only when a prosecutor requests it, after a due process hearing, and after a judicial officer finds it to be absolutely necessary. Release should be the norm, as *U.S. v. Salerno*, 481 U.S. 739 (1987), dictates.

4. Think carefully before limiting pretrial detention eligibility to a strictly defined list of charged offenses or circumstances. Reducing judicial discretion inevitably prompts vocal opposition from law enforcement, the judiciary, and others. Whether or not you create a list of offenses eligible for detention, develop a muscular "limiting process" that requires the State to demonstrate–and the judicial officer to find–that detention is absolutely necessary, and that no condition or combination of pretrial release conditions can reasonably assure the person's appearance in court and the safety of the community. This is a high bar, but it is one that courts have repeatedly deemed necessary. Detention based simply on a fear that someone will reoffend will not meet the mark, particularly given the presumption of innocence, the presumption of release, and the rarity of significant offenses being committed on pretrial release.

5. Permit, but do not require, localities to adopt pretrial assessment tools. Most people who are released will appear in court and be law-abiding, but some will need assistance to succeed. Assessment results can help identify who is most likely to do well with no support and who may benefit from assistance.

6. Conduct first appearance hearings (usually referred to as "arraignments" in California) within 24 to 48 hours of arrest, and make them meaningful: people should be represented, have an opportunity to meet with counsel beforehand, and be informed of their rights. At this hearing, a decision is typically made about whether the person will be released before trial and under what, if any, conditions. Many release conditions, such as electronic monitoring, house arrest, or burdensome in-person reporting requirements, impose significant restrictions on a person's physical freedom.

7. Upon a decision to release, impose only the least restrictive conditions necessary to have a reasonable assurance of court appearance and community safety. Use conditions that impinge on a person's freedom–like electronic monitoring, drug testing, or frequent in-person meetings with supervising officers–*only* as a last resort, and only when there is a clearly demonstrated need. And never require the person accused to pay for any of the court-ordered conditions.

Process for Development and Implementation of Improvements

8. Be aware of the implementation challenges at the local level: passing laws or implementing statewide court rules does not necessarily lead to meaningful change. The logistics and funding of county-level efforts are critical: the most effective strategies for addressing issues like public defense, court schedules, case processing, transportation, and availability of supportive services

will vary from county to county. But they can make or break any effort to improve the pretrial system.

9. Involve key system and community stakeholders in the process of policy change. Make sure to involve a diverse group–both system actors (like judges, defenders, prosecutors, law enforcement, and pretrial services) and community members (including victim advocates, service providers, and those with lived experience). And engage people in urban, suburban, and rural areas. Each locality will have a different set of concerns and challenges.

10. Use data to better understand and explain the problem you are seeking to resolve: the first step to solving a problem is defining it. If you can't demonstrate that there is a need for change, it is nearly impossible to get people on board for improvements. And use research to inform your proposed solutions. Since research and evidence in the pretrial field are constantly evolving, state-level changes should rarely *mandate* particular practices and should always make evidence a requirement.

Thank you for the opportunity to provide our input on these important matters. We look forward to speaking with you.

All the best,

Alison Shames and Matt Alsdorf
Center for Effective Public Policy

Exhibit J

Professor Sandra Susan Smith

Harvard Kennedy School

PRETRIAL DETENTION, PRETRIAL RELEASE, & PUBLIC SAFETY

JULY 2022

SANDRA SUSAN SMITH, PH.D.,
HARVARD UNIVERSITY

Arnold Ventures

This article is part of a series of papers that Arnold Ventures commissioned exploring the relationship between the justice system and public safety. Find the rest of the series at ArnoldVentures.org/PublicSafetySeries.

INTRODUCTION

In 2016, several defendants filed a class-action lawsuit against Harris County, Texas for unconstitutional bail practices against people arrested for misdemeanor offenses. Specifically, in *O'Donnell et al. v. Harris County*, the plaintiff class accused the County of setting bail amounts so high that many were detained pretrial for no other reason than that they could not afford bail.[1] To end litigation, the County agreed to reform its pretrial systems and practices to protect the due process and equal protection rights of individuals arrested for misdemeanor offenses.

Among other things, the *O'Donnell* Consent Decree,[2] as the agreement is known, requires that most misdemeanor defendants be released immediately on their own recognizance (i.e., without secured bond);[3] that those ineligible for immediate release be granted a hearing – and access to an attorney – within 48 hours of arrest; and that when secured money bail is imposed, not only should the amounts assessed be based on evidence of defendants' ability to pay but also that less restrictive conditions could not reasonably ensure their appearance for trial.[4] The Decree also established a role for an independent monitor to evaluate compliance, track the effects of new practices on relevant pretrial outcomes, and promote transparency by publishing regular reports on the progress of the Decree.[5]

In March of 2021, two years after bail reforms were implemented, the Independent Monitor released its second of two reports. *Monitoring Pretrial Reform in Harris County: Second Report of the Court-Appointed Monitor*[6] included results from analysis estimating the effect that bail reform measures have had on misdemeanor defendants' current and future penal system outcomes. Specifically, since bail reform, while the average daily misdemeanor jail population has declined significantly, there have been no observed increases in recidivism rates among those released pretrial that would suggest a public safety threat.[7]

The report also addressed speculations about the effect that bail reform has had on spikes in violence: "As murders have gone up in Harris County, with this year's totals the highest in years, members of the public and public officials have understandably sought explanations. We have noted some public statements linking homicides to 'bail reform.' However, we find no evidence that bail reform has led to an increase in homicides, and those who have asserted otherwise have not identified any data to support the assertion."[8] Thus, the Monitor's core findings were in line with the Court's finding in *O'Donnell* that "money bail does not meaningfully promote public safety or appearance in court."

A formal response by Harris County District Attorney, Kim Ogg, was relatively swift and unequivocal. In *Bail, Crime, & Public Safety: A Report by the Harris County District Attorney's Office to the Harris County Commissioners Court,* she criticizes the Monitor's recidivism-related analysis and findings. Based on her own office's analysis of the same data, she reports not only that bail reform led to substantial increases in recidivism rates, but also that increases in violent crimes were directly attributable to reform-related pretrial release practices. Speaking for prosecutors, police, and crime victims, whose daily experiences were claimed to conflict with the Monitor's recidivism findings, DA Ogg wrote, "'Bail

reform,' as presently practiced in some Harris County courts, will continue to be a driving factor in the crime crisis gripping our community." Her message was clear. Harris County's bail reform experiment had failed; money bail *does* meaningfully promote public safety and should be reinstated to protect the public from further harm.

As a growing number of jurisdictions across the country have attempted to implement bail reforms, debates have intensified about the relationship between such reforms and crime, including and perhaps especially violent crime.[9] Similar debates, for instance, have raged in New York, where the backlash against bail reform caused the state legislature to roll back key elements just three months after implementation. In recent weeks, New York Governor Kathy Hochul has proposed further rollbacks to the law to address continued concerns that bail reform has contributed to spikes in the state's violent crime rate.[10]

Although largely driven by politics, these debates raise an important and timely set of empirical questions: *What role does pretrial detention/release play in producing, or threatening, public safety? Does pretrial release incentivize crime and drive-up crime rates, including violent crime, as many in law enforcement have claimed? Or, all things considered, is pretrial detention the greater risk to public safety?*

This discussion paper is an effort to synthesize the evidence on this question. Before doing so, however, I specify the conceptualizations of public safety that I deploy throughout. I then draw from academic and policy research on the costs and benefits to public safety of pretrial detention/release, distinguishing evidence from studies of the impacts of releases resulting from routine pretrial practices, from bail reform, and from responses to the Covid-19 pandemic. No matter the cause of pretrial release, the evidence seems clear: Overall, pretrial detention is a far greater threat to public safety than pretrial release. Not only does detention increase the risk that even low-risk individuals might reoffend (or be rearrested), but detention also initiates a series of collateral consequences downstream that are difficult for many to overcome.

DEFINING PUBLIC SAFETY

Barry Friedman's "What is Public Safety?" is a timely and important addition to debates about how we might reimagine public safety. The NYU law professor suggests that in the U.S. we have historically privileged what he calls the "protection function," i.e., we place urgency on "guarding people from violent injury to person or property caused by third parties, and perhaps by nature…"[11] And, indeed, research on how pretrial detention and release affect public safety has focused on a core set of outcomes related to the protection function – failure to appear (FTA), conviction on current charges, and measures of recidivism, including new criminal complaints or arrests, new prosecutions, and/or new convictions. The public is safer when these rates are low or trending downward, and through law enforcement, it is the government's first duty to ensure these outcomes.

Friedman critiques this narrow conceptualization of public safety, however, arguing that by privileging protection from injury to the exclusion of other conceptualizations, we have likely made our communities *less* safe. He suggests instead that we should expand the notions of public safety that we privilege to include domains beyond the protection function.

Specifically, to be safe is to also have basic needs met: "Many people are not safe because of government neglect beyond the protection function: from hunger and malnutrition, from lack of housing, from subpar education, from no health care, and more. But people also are unsafe because of privileging the protection function in ways that renders it unaccountable."[12]

Importantly, public-safety-as-basic-needs is important in its own right. It also has major implications for public-safety-as-protection, however, since deprivations in the former increase risks to the latter. Access to employment, for instance, and especially good jobs, allows individuals to care for themselves and their families, but lack of the same increases the risk to public safety as people engage in potentially harmful behaviors to get their needs met.[13] The reverse is also true: Being deemed a threat to public safety diminishes one's employment prospects as well as access to other valued societal resources and so threatens public safety when conceptualized in terms of meeting basic needs, a point borne out by recent research. Although it has rarely been described as such, prior research has also investigated the effect of pretrial detention and release on public-safety-as-basic-needs, including individuals' psychological and physical health and well-being,[14] employment prospects,[15] housing stability,[16] and social bonds.[17] In the synthesis to follow, to assess the costs and benefits to public safety of incarcerating versus releasing people pretrial, I privilege both categories of public safety when drawing from growing bodies of research.

THE BENEFITS AND COSTS OF PRETRIAL DETENTION

Pretrial detention has two recognized functions – to ensure that defendants who are at risk of flight appear in court, and to protect the public and crime victims from (further) harm.[18] People who are detained pretrial are there because they are denied bail, cannot afford bail, or cannot meet other conditions set in their case.[19] Most, however, are held because they cannot make bail.[20] Pretrial detainees are often the poorest of the poor, arrested as much (if not more) for being offensive to the broader society than for having broken laws of any significance (Irwin 2013). And more people are detained pretrial than almost ever before. Since 1970, the pretrial population has increased by 433%. Since 1990, much of that increase has been attributable to our greater reliance on money bail systems. While the percentage of those who have been denied bail and who have been released without money bail has steadily declined, the percentage being held or who have been released on money bail has increased significantly.[21] Indeed, an important part of the mass incarceration story is the story about pretrial detention.[22]

Has mass detention made us safer? Whether public safety is defined in terms of protection or in terms of meeting basic needs, the bulk of the evidence makes clear that mass detention has done far more to erode public safety than to protect it. Still, there are circumstances under which pretrial detention fulfills the protection function, reducing the likelihood that injury will occur to persons and property.

THE GROSS (VS NET) BENEFITS OF PRETRIAL DETENTION

Two benefits are attributed to pretrial detention. The first is that it reduces the likelihood that defendants will fail to make court appearances (FTA).[23] The second is that it reduces the likelihood of new criminal legal system involvement. In this regard, two recent studies are worth noting. Leslie and Pope's 2017 study of the impact of pretrial detention on case outcomes in New York City found positive effects of incapacitation. Specifically, being detained reduced the probability of being rearrested before disposition by 12.2 and 10.6 percentage points for felony and misdemeanor defendants, respectively. They state, "The reduction in pretrial rearrests highlights the meaningful incapacitation effect of keeping suspected potential criminals behind bars."[24] Published one year later, Dobbin, Goldin, and Yang used the detention tendencies of quasi-randomly assigned bail judges in Philadelphia and Miami-Dade bail systems to estimate the causal effects of initial pretrial release on FTA and new crime. They found that releasing instead of detaining

the marginal defendant increased the probability of FTA by 15.6 percentage points (or 129% increase) and of rearrest prior to case disposition by 18.9 percentage points (or 122% increase).[25] In other words, pretrial detention can act as a preventative measure, particularly so for high-risk defendants.

Both sets of researchers, however, find that positive incapacitation effects are offset by detention's negative criminogenic effects. For Leslie and Pope, detention might have reduced the probability of rearrest before disposition, but after disposition, the probability of being rearrested within 2 years *increases* by 7.5 and 11.8 percentage points for the felony and misdemeanor subsamples, respectively. For Dobbie, Goldin, and Yang, although marginally released defendants are 18.9 percentage points more likely to be rearrested for a new crime, they are 12.1 percentage points less likely to be arrested after case disposition. In other words, pretrial detention might prevent detained individuals from participating in crime while they are detained, but detention *increases* the likelihood that formerly detained people will commit crime after case disposition.

Further, a growing body of research indicates that pretrial systems do not have to rely on detention to ensure court appearances. In multiple contexts, research has found that simply reminding defendants of approaching court dates with postcards, text messages, and/or phone calls increases appearance rates significantly[26] and without any of the short- and long-term harms associated with pretrial detention (see below).

RELEASING PEOPLE PRETRIAL DOES NOT THREATEN PUBLIC SAFETY

A growing body of research indicates that when penal systems reduce their reliance on cash bail, not only do rates of pretrial detention decline substantially, but they do so without significantly increasing rates of rearrests. Following state-level bail reforms, for instance, Kentucky, and New Jersey[27] saw increases in rearrest rates on the order of 1-2 percentage points and 2.7 percentage points, respectively. In both instances, however, the reports' authors cautioned readers not to make too much of differences, which were either too small to be meaningful or were the result of natural fluctuations. And in at least five contexts, among those released pretrial, bail reform had no statistically significant impact on rearrest rates. In Cook County, Illinois, not only was there no change in overall crime in the year following bail reform,[28] but there was also no significant change in the rate of new criminal charges filed against people released pretrial.[29] Similar results have been reported for New York City,[30] Philadelphia,[31] Yakima County, Washington,[32] and Jefferson County, Colorado. [33]

Neither is there any compelling evidence that, following bail reform, pretrial release has led to increases in *violent* crime.[34] After bail reform in Cook County, researchers found no statistically significant increase in the rate of new charges for violent criminal offenses among people on pretrial release.[35] In New York City, researchers reported a 3-percentage point increase in the rate of new violent felony arrests among people released through the program (relative to comparison group); however, this increase was statistically insignificant.[36] In Kentucky, although there was a slight increase in the overall rearrest rate for people released following the state's bail reform, there was no increase in the rate of new arrests for violent felonies.[37] Combined, these studies offer compelling evidence that jurisdictions that have reduced their reliance on money bail have not threatened public safety. Importantly, widespread reports also indicated that declines in jail populations associated with the Covid-19 pandemic did little, if anything, to increase rates of crime; to the contrary, as arrests and jail admissions plummeted and as detained individuals were sent home to depopulate crowded jail facilities, in almost all categories of crime, rates also fell precipitously.[38] Homicides were the one exception, but as indicated above, this likely had little if anything to do with increases in pretrial release.

THE COSTS OF PRETRIAL DETENTION

Whether public safety is defined in terms of protection or in terms of meeting basic needs, the net costs to public safety for holding people pretrial are substantial. It is difficult to imagine how much damage just a few days in jail can do to the life of an individual and the communities to which they belong, but recent research indicates that spending any more than one day in pretrial detention can have devastating consequences.[39]

Public Safety as Protection

Not only does pretrial detention increase the likelihood of conviction on current charges[40] and lead to more severe sentences with conviction,[41] as indicated above, it has also been found to increase the likelihood of future penal system involvement significantly and substantially. Lowenkamp, VanNostrand, and Holsinger (2013) were arguably the first to report this.[42] To investigate the impact of pretrial detention on FTAs, arrests for new criminal activity pretrial, and post-disposition recidivism, they used data on over 150,000 defendants booked into Kentucky jails between 2009 to 2010 and found that the longer they were detained, the more likely they were to FTA, to have new penal contact pending trial, and to recidivate 12- and 18-months post-disposition.[43] Importantly, their outcomes were most pronounced for low-risk defendants.

Despite deploying a whole host of controls, Lowenkamp, VanNostrand, and Holsinger's study design would not allow them to make causal claims. Several more recent studies have followed suit, however, most adopting rigorous methodologies enabling their authors to make compelling statements about the effect of pretrial detention on future penal system involvement.[44] For instance, in a 2016 study, Heaton, Mayson, and Stevenson used detailed data on hundreds of thousands of misdemeanor cases resolved in Harris County, Texas to measure the effects of pretrial detention on case outcomes and future crime. They found that detained defendants were more likely to later be accused of committing crimes. Specifically, detention increased the share of defendants charged with new misdemeanors by 9.7 percent at 18 months post-hearing; it also increased the likelihood of any future felony charges by 32.2 percent. With a quasi-experimental analysis, they confirmed that differences likely resulted specifically because of pretrial detention.[45] These findings are in line with those reported by the Harris County Monitor. Gupta, Hansman, and Frenchman used a large sample of criminal cases in Philadelphia and Pittsburgh to analyze the consequences of the money bail system, a proxy for pretrial detention. To isolate its causal effect, they exploited variation in bail-setting tendencies among randomly assigned bail judges. Their results suggest that the assignment of money bail not only leads to a 12-point increase in the likelihood of conviction, but it also leads to a 6–9 percent increase in recidivism.[46] And, as stated above, more recently, Leslie and Pope and also Dobbin, Goldin, and Yang found that because of its incapacitation effect, pretrial detention reduced the likelihood of new criminal legal system involvement, but because of detention's criminogenic effect, it also *increased* the likelihood of later being accused of crime.[47] Loeffler and Nagin's recent review of methodologically rigorous studies on this question confirms that pretrial detention threatens public safety at least in part by exacerbating postrelease recidivism.[48]

There are three major take-aways from this small but growing body of research. First, being held in detention pretrial beyond one or two days increases a person's chances of being arrested and charged again pretrial (for those eventually released before case disposition) and post-disposition.[49] Second, all things considered, the longer one's stint in detention, the greater the odds of new penal contact.[50] And third, the effects of pretrial detention on future penal system involvement are especially pronounced for low-risk defendants,[51] individuals who likely would not have had further criminal legal system involvement had they not been held in detention. Thus, a growing body of research indicates that pretrial detention is creating "recidivators" out of individuals who might not otherwise (re)offend.

But pretrial detention also threatens the safety of the individuals who are held. Incarcerated people routinely endure the pains of imprisonment.[52] It is not only that individuals must be hypervigilant to reduce their chances of being victimized by other incarcerated people. They must also be wary of the intentions of correctional officers and other jail staff, who routinely engage with incarcerated people in ways that are dismissive, contemptuous, neglectful, and violent.[53] In jail, rates of predation are high, and predation comes from incarcerated people and correctional staff alike. Take sexual assault, for instance. In recent surveys, roughly three percent of individuals incarcerated in jails, prisons, and juvenile detention centers reported experiencing sexual assault in the past year; in half of those cases, the perpetrator was a staff member at the facility.[54] And reports of sexual victimization are on the rise – from 2,411 in 2012 to 8,651 in 2018.[55]

Further, mortality rates, already high, are also on the rise. A significant minority of incarcerated people die from suicide, and homicides are also a major cause of death, but illness takes most.[56] Deaths from Covid-19 are the most recent example of this. According to the COVID Prison Project, which tracks data and policy across the country, since the pandemic began, there have been roughly 700,000 reported infections among people incarcerated and working

in prisons and over 3,000 reported deaths; these figures are almost certainly underestimates as many facilities do not officially track and systematically report. Jails are responsible for the health and well-being of their inhabitants, but many fail miserably at providing protection and safety to those in their charge. And in so failing, they not only increase the risk of harm to those who are being detained, they also indirectly increase the risk of injury to persons and property in communities beyond jail facilities. As is often stated, hurt people hurt people.

Public Safety as Meeting Basic Needs

If public safety is conceptualized in terms of meeting basic needs, a large and growing body of research also indicates that pretrial detention can injure individuals' physical and psychological well-being,[57] employment prospects,[58] housing stability,[59] and financial stability.[60] Injury occurs during detention, but pretrial detention also has downstream effects on individuals' social, economic, and psychological health and well-being.

In absolute and relative terms, jails are awful places. With poor and unstable funding, jails tend to employ staff who are underpaid and poorly trained. Staff manage incarcerated persons in facilities that are often unsafe, unsanitary, and lacking adequate space. Detention facilities offer limited, if any, programming to occupy and engage incarcerated people. They have rules and regulations that are inconsistently enforced but punitively sanctioned for noncompliance, making daily life unpredictable and volatile. As we have learned from the Covid-19 pandemic, jails are also breeding grounds for the spread of infectious disease and violence.[61] But jails also provide meager health care and other essential social services. This is a distressing reality given that people incarcerated in jails are a heterogeneous population disproportionately beset with several often-untreated chronic health conditions, mental health illnesses, and substance abuse problems.[62,63]

These combined hardships represent two related types of punishments[64,65]— environmental (or physical) and private (or psychological). Environmental punishments reflect the material impositions that incarcerated individuals face. In some contexts, they must sleep on floors when, due to overcrowding, facilities lack enough beds. They must contend with excessive heat or cold, but their complaints about their discomfort are almost always ignored. Not only are infestations of rodents, mold, and mildew typical, these environmental conditions can worsen or help to create the chronic physical and mental health conditions with which many incarcerated people struggle. People who are incarcerated also lack adequate health care. They are poorly fed; food is inadequate in serving size and of questionable quality. They lack personal hygiene due to insufficient access to showers, toiletries, and laundry. And because jails often lack programming of any kind, boredom overwhelms detained people and contributes to their misery. People who have been incarcerated complain most about these inhumane conditions.[66]

But the injury suffered because of pretrial detention extends beyond facilities' walls to affect many domains of individuals' lives. It diminishes formerly detained individuals' employment prospects, for instance. Dobbie, Goldin, and Yang report that, compared to detained individuals, released defendants are 11.3 percentage points more likely to have an income two years after bail and 9.4 percentage points more likely to be employed 3-4 years after bail. In other words, detention reduces employment probabilities substantially relative to pretrial release. These authors argue that the primary mechanism for the reduction is having a criminal conviction, since detention increases the likelihood of conviction on current charges as detained people accept guilty pleas to resolve their cases.[67] But they point to three other possible mechanisms: 1) detained individuals cannot work in the formal sector of the labor market while detained;[68] 2) if detained individuals have a job when arrested and detained, they might lose it;[69] and 3) employers prefer not to hire individuals with records of arrest, even without conviction, and this stigma also makes finding and keeping work difficult.[70] Indeed, consistent with prior research about the detrimental effects of pretrial detention on employment prospects, new research shows that New Jersey's 2014 pretrial reforms were associated with a 6.8 percentage point increase in employment probability among Black people.[71] Importantly, because reforms did not affect White people's employment,[72] they might have also reduced Black-White racial disparities in employment overall.

Housing is also a serious concern for those who have been detained, especially so for people with longer detention spells.[73] For those who lose their homes while incarcerated, securing housing after release is one of the most serious barriers to reentry, disproportionately so for Black and Latino returning citizens. Geller and Curtis explain that for returning citizens, it is easier to apply for employment and access treatment and services if they have stable housing.

However, the stigma of incarceration, lack of financial resources, strained familial relations, and public housing restrictions for those with certain offenses all represent major barriers to housing security. Thus, even at equal levels of income, Geller and Curtis find that formerly incarcerated men experience considerably more housing insecurity[74] than those who were never incarcerated. Therefore, they conclude that the relationship between housing insecurity and incarceration is due in part to factors beyond the labor market. These results indicate that the carceral system itself plays a central role in generating residential instability. Other studies have shown that the uncertainty and instability associated with housing insecurity can also lead to further criminal legal involvement among reentry populations.[75]

Finally, pretrial detention also increases the burden of fines and fees associated with criminal legal system contact. In a 2017 review, Martin, Smith, and Still outline the five types of legal financial obligations (LFOs) — fines, forfeiture of property, costs, fees, and restitution — and illuminate the ways these sanctions impede the reentry efforts of formerly incarcerated people.[76] Because courts rarely consider indigency when they set LFOs, low-income individuals and their families are saddled with legal debt that can last for decades. Importantly, however, although a growing body of empirical research has examined the imposition of LFOs and their implications for successful reentry,[77] studies about LFOs rarely include the debt that people carry after bailing out. Nor does this body of research typically include accumulated debt resulting from other collateral consequences associated with detention, like reclaiming one's car from impound. Writings on bail have largely and understandably focused on how the poor are penalized by such assessments; few studies focus on bail loans as part and parcel of LFOs, broadly defined.[78] Still, bailing out is a primary source of detention-related debt, and detention-related debt is a major part of the LFO story. Paying off all debt related to criminal legal system contact can significantly reduce take-home pay for families, and so they face challenges meeting other needs and obligations, such as finding stable housing, transportation, and employment; obtaining credit; and making child support payments. Furthermore, formerly detained people's efforts to achieve upward mobility through educational attainment, property acquisition, etc., can also be stalled for years.

To better understand the economic costs associated with pretrial detention, University of Utah law professor Shima Baradaran Baughman applied a cost-benefit analysis to this form of incarceration and determined that the public only benefits from pretrial detention when it detains *only* the most dangerous people – people detained for violent felonies. This is essentially what Washington, D.C. does. In estimating costs, Baughman appropriately took into consideration notions of public safety as protection and as fairly basic needs – for instance, freedom, income, housing, childcare costs, property, intimate relationships, and the possibility of violent or sexual assault, which, as indicated above, is pervasive in U.S. jails. By contrasting estimates of detention's costs to individuals and society with the cost of releasing all or most defendants pretrial, she determined that universal pretrial release would be far less costly, *but it would be even more cost-effective to release some and detain others*. Specifically, it would be more cost effective to release nonviolent detainees while detaining those who pose a violent crime risk. Her reasoning is as follows: The costs to the individual and society if released nonviolent defendants commit similar crimes while on bail are relatively low, but if individuals accused of violent crimes commit similar crimes while on bail, those costs to society would be very high. When compared to current policies, Baughman estimates that the public would save $14 billion by moving to universal release and $78 billion by releasing most and detaining only people arrested for violent felonies. Dobbie, Goldin, and Yang conduct a similar cost-benefit analysis and find that the net cost for three or more days in detention is between $55K and $99K per marginal defendant and that detention is perhaps even more costly for defendants with no prior criminal history – $85K to $162K. Given this, and consistent with Baughman, they also suggest that it would be preferable to use alternatives to detention than to detain as many people as we do, especially low-risk defendants without a prior criminal record.

SUMMARY AND CONCLUSION

Despite claims by members of the law enforcement community, pretrial release – whether the result of bail reforms, responses to the Covid-19 pandemic, or other policies – does not drive-up crime rates and is very unlikely to be the cause of the recent spikes of violence across the country, as evidence by the fact that violent crime has spiked as much if not more in jurisdictions where no bail reform has occurred. Instead, the bulk of the evidence suggests that pretrial detention is most beneficial to public safety when it is only used to incapacitate people at high risk of committing violent offenses. For the vast majority of arrests – nonviolent felony and misdemeanor offenses – pretrial detention appears to do far more harm than good, for individuals, their families, and the broader society. Not only does it significantly increase the likelihood of injury to persons and property, but it also substantially reduces the likelihood that people will be able to get their basic needs met, in the short- and long-term.

ENDNOTES

1 Maranda Lynn ODonnell, et al. v. Harris County, Texas, et al., No. 16-cv-01414 (United States District Court for the Southern District of Texas, Houston Division November 21, 2019).

2 https://jad.harriscountytx.gov/ODonnell-Consent-Decree.

3 "Administrative Order Number 2019-01" (Harris County Criminal Courts at Law, January 17, 2019), https://hccla.org/wp-content/multiverso-files/829_56990d05d6719/AdminOrder-MISD.pdf.

4 "Administrative Order Number 2019-01," 3.

5 "Administrative Order Number 2019-01."

6 Garrett and Guerra Thompson, "Monitoring Pretrial Reform in Harris County, First Sixth Month Report of the Court-Appointed Monitor.".

7 Garrett and Guerra Thompson, "Monitoring Pretrial Reform in Harris County, Second Report of the Court-Appointed Monitor," 41–42. The Monitor's relevant findings include the following: 1) A gradual decline in repeat offending rates across the entire 2015-2019 period, based on numbers of repeat-offense cases. 2) Slightly declining rates of individual people arrested for misdemeanors who repeat-offend in each year from 2015 to 2019 (from 23.4% in 2015 to 20.5% in 2019). 3) A slight increase in the share of cases associated with a new felony case (from 10.7% in 2015 to11.4% in 2019). 4) Only about 1% of those arrested for a misdemeanor offense in 2019 were re-arrested on four or more separate occasions within 365 days, a rate that has not substantially changed form 2015-2019.

8 Garrett and Guerra Thompson, 22.

9 Holmes Lybrand and Tara Subramaniam, "Fact-checking claims bail reform is driving increase in crime," CNN, July 7, 2021; "https://news.wttw.com/2021/08/15/behind-police-leaders-claims-bail-reform-responsible-surge-violence," WTTW CNN News, August 15, 2021; Joe Barrett, "Some police push back on bail reform, citing wave of killings," The Wall Street Journal, July 16, 2021; Ally Peters, "Bail reform and increased violence," ABC News10, July 9, 2021; Ally Peters, "Is New York's bail reform actually behind an increase in violence in Rochester?" RochesterFirst.com, July 8, 2021; Lindsay Beyerstein, "Did bail reform really cause a crime wave?" City&State New York, February 18, 2020.

10 Under current law, to preserve the presumption of innocence, when considering bail, judges cannot consider the extent to which they believe people pose a public safety risk. But, according to a recent Brennan Center report, Hochul proposes to "allow judges to set bail almost any time someone is rearrested after initially being released, even for a low-level misdemeanor." Ames Grawert and Noah Kim. 2022. The Facts on Bail Reform and Crime Rates in New York State. Brennan Center for Justice, March 22.

11 Barry Friedman, "What is Public Safety?" Law and Economic Research Paper Series, Working Paper No. 21-05; Public Law and Legal Theory Research Paper Series, Working Paper No. 21-14, 2021: 5.

12 Friedman, 7.

13 Crystal S. Yang, "Local Labor Markets and Criminal Recidivism," Journal of Public Economics 147: 16-29, 2016.

14 J.A. Bick, "Infection control in jails and prisons," Clinical Infectious Diseases 45(8), 1047–55, 2007; Beck, A. J., Berzofsky, M., Caspar, R. and Krebs, C., "Sexual victimization in prisons and jails reported by inmates, 2011-12-Update." NCJ 241399. Washington, D.C.: Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, 2014; Noonan, M. E., "Mortality in Local Jails, 2000-2014 - Statistical Tables." NCJ 250169. Washington, D.C.: Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, 2016a.

15 Dobbie, W., Goldin, J., & Yang, C. S., "The effects of pretrial detention on conviction, future crime, and employment: Evidence from randomly assigned judges," American Economic Review, 108(2), 201-40, 2018.

16 Geller, A., & Curtis, M.A. (2011). "A sort of homecoming: Incarceration and the housing security of urban men." Social Science Research 40(4), 1196–1213; Harding, D.J., Morenoff, J. D., & Herbert, C.W. (2013). "Home is hard to find: Neighborhoods, institutions, and the residential trajectories of returning prisoners." The ANNALS of the American Academy of Political and Social Science 647(1), 214–36.

17 Shover, N. (1996). Great Pretenders: Pursuits and Careers of Persistent Thieves. Boulder, CO: Westview Press; Irwin, J. (1985). The Jail: Managing the Underclass in American Society. Berkeley: University of California Press.

18 In The Jail, however, John Irwin (2013[1985]), described another purpose, unrecognized: to manage the rabble, the mostly detached and disreputable persons who are arrested more because they are offensive than because they have committed crimes.

19 St. Louis, 51.

20 Elydah Joyce, "The path from arrest to pretrial detention," Prison Policy Initiative, 2016.

21 Patrick Liu, Ryan Nunn, and Jay Shambaugh, "The economics of bail and pretrial detention," The Hamilton Project, December 2018.

22 It is by now well known that in the United States, the penal system supervises almost seven million people. This includes 4.5 million people in community corrections. It also includes 2.3 million incarcerated individuals. On any given day, of those incarcerated, approximately 29 percent, or 750,000, are being held in our nation's local jails. Roughly 10.6 million people are admitted to local jails every year. Importantly, most of jails' inhabitants, disproportionately Black and Latino, have not been convicted of crime.

23 This is often described as "flight risk," with the implication that people who do not appear in court are attempting to avoid prosecution. For the overwhelming majority of defendants, however, this is far from true. As noted in The Case against Pretrial Risk Assessment Instruments, "People who are poor face greater obstacles to appearing in court than those who have greater access to resources. Forgoing paid time, risking employment, finding childcare,

and accessing reliable transportation are just some of the barriers experienced by people with low-paying jobs and few resources. This issue is compounded by higher rates of poverty among Black, Latinx, and Indigenous people. Acknowledging and addressing these barriers could raise court appearance rates" (Pretrial Justice Institute, 2020: 2-3).

24 Leslie, E., & Pope, N. G. "The unintended impact of pretrial detention on case outcomes: Evidence from New York City arraignments," The Journal of Law and Economics, 60(3), 529-557, 2017.

25 Dobbie et al, 2018.

26 Cooke, Brice, Binta Zahra Diop, Alissa Fishbane, Jonathan Hayes, Aurelie Ouss, and Anuj Shah. 2018. Using behavioral science to improve criminal justice outcomes. University of Chicago Crime Lab Report. Howat, Holly, Craig J. Forsyth, Raymond Biggar, and Samantha Howat. 2016. "Improving court-appearance rates through court-date reminder phone calls." Criminal Justice Studies 29 (1):77-87. doi: 10.1080/1478601X.2015.1121875. Ferri, Russell. 2019. Desk Appearance Tickets and Appearance Rates — The Benefits of Court Date Reminders. New York, NY: New York City Criminal Justice Agency.

27 Glenn A. Grant, "Jan. 1- Dec. 31, 2018, Report to the Governor and the Legislature" (New Jersey Courts, 2019), 13, https://www.njcourts.gov/courts/assets/criminal/2018cjrannual.pdf.

28 Stemen, Don, and David Olson. "Dollars and Sense in Cook County: Examining the Impact of General Order 18.8A on Felony Bond Court Decisions, Pretrial Release, and Crime." Chicago: Loyola University Chicago, 2020, 12.

29 Stemen and Olson, 11.

30 Melanie Skemer, Cindy Redcross, and Howard Bloom, "Pursuing Pretrial Justice Through an Alternative to Bail" (MDRC, September 2020), 57, https://www.mdrc.org/sites/default/files/Supervised_Release_Final_Report.pdf.

31 Citation: Claire M.B. Brooker, "Yakima County, Washington Pretrial Justice System Improvements: Pre- and Post-Implementation Analysis" (Pretrial Justice Institute, November 2017), 6, https://justicesystempartners.org/wp-content/uploads/2018/02/2017-Yakima-Pretrial-Pre-Post-Implementation-Study.pdf.

32 Ouss, Aurelie and Stevenson, Megan, Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors (June 20, 2020). Available at SSRN: https://ssrn.com/abstract=3335138 or http://dx.doi.org/10.2139/ssrn.3335138.

33 Brooker, Jones, and Schnacke, "The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds," 7–8.

34 Grant 2018; Ouss and Stevenson 2019.

35 Don Stemen and David Olson, "Dollars and Sense in Cook County: Examining the Impact of General Order 18.8A on Felony Bond Court Decisions, Pretrial Release, and Crime" (Chicago: Loyola University Chicago, 2020), 11. https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/11/Report-Dollars-and-Sense-in-Cook-County.pdf.

36 Melanie Skemer, Cindy Redcross, and Howard Bloom, "Pursuing Pretrial Justice Through an Alternative to Bail" (MDRC, September 2020), 57, https://www.mdrc.org/sites/default/files/Supervised_Release_Final_Report.pdf.

37 Stevenson, 360–61.

38 ACLU Analytics, "Decarceration and crime during COVID-19," ACLU News and Commentary, July 27, 2020.

39 Irwin 2013; Scott-Hayward, C., & Fradella, H.F. (2019). Punishing Poverty: how bail and pretrial detention fuel inequalities in the criminal justice system. Berkeley: University of California Press.

40 Gupta, A., Hansman, C., and Frenchman, E. (2016). The heavy costs of high bail: Evidence from judge randomization. Journal of Legal Studies 45, 471–505; Heaton, P., Mayson, S. G., and Stevenson, M. (2017). The downstream consequences of misdemeanor pretrial detention. Stanford Law Review 69(3), 711–794; Holsinger, A. M. (2016). Exploring the Relationship between Time in Pretrial Detention and Four Outcomes. Crime and Justice Institute Research Brief, Community Resources for Justice; Leslie, E. and Pope, N. G. (2017). The unintended

impact of pretrial detention on case outcomes: Evidence from New York City arraignments. The Journal of Law and Economics 60(3), 529–557; Dobbie, Goldin, and Yang 2018; Kim, J., Chauhan, P., Lu, O., Patten, M., and Smith, S. S. (2018). Unpacking pretrial detention: An examination of patterns and predictors of readmissions. Criminal Justice Policy Review 29(6), 663–687.

41 Heaton et al. 2017; Leslie and Pope 2017; Stevenson 2017; Didwania 2018; Dobbie et al. 2018.

42 Lowenkamp, Christopher T., Marie VanNostrand, and Alexander Holsinger. 2013. "The Hidden Costs of Pretrial Detention." Laura and John Arnold Foundation, Houston, TX.

43 See also Holsinger 2016.

44 Gupta et al. 2016; Heaton et al. 2017; Leslie and Pope 2017; Stevenson 2018; Dobbie et al. 2018.

45 Heaton et al. 2017.

46 Gupta et al. 2016.

47 Dobbie et al. 2018; Leslie and Pope 2017.

48 Loeffler, Charles E. and Daniel S. Nagin. 2022. "The Impact of Incarceration on Recidivism." Annual Review of Criminology, 5: 15.1-15.20.

49 Heaton et al. 2017; Gupta et al. 2016; Dobbie et al. 2018.

50 Lowenkamp et al. 2013.

51 Lowenkamp et al. 2013.

52 Walker, M. L. (2014). Punishment and coping in "Golden County": An ethnography of jail living, UC Riverside Electronic Theses and Dissertation.

53 Wynn, Jennifer. (2001). Inside Rikers: Stories from the world's largest penal colony. New York: St. Martin's Press; McKendy, L. (2018). The pains of jail imprisonment: Experiences at The Ottawa-Carleton Detention Centre. Dissertation,Carleton University.Access:https://curve.carleton.ca/96758ed0-204e-46b3-8f31-6df3d1650c99

54 Beck 2013; see also Rantala, R. R.(2018). Sexual victimization reported by adult correctional authorities, 2012–15. NCJ 251146.Washington, D.C.: Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice.

55 Laura M. Maruschak and Emily D. Buehler. 2021. Survey of Sexual Victimization in Adult Correctional Facilities, 2012-2018 – Statistical Tables, June. https://bjs.ojp.gov/library/publications/survey-sexual-victimization-adult-correctional-facilities-2012-2018.

56 Noonan 2016; Sainato 2019.

57 Bick 2007, Beck et al. 2013, Noonan 2016.

58 Dobbie et al. 2018.

59 Geller and Curtis 2011; Harding, Morenoff, and Herbert 2013.

60 deVuono-powell, S., Schweidler, C., Walters, A., and Zohrabi A. (2015). Who pays? The true cost of incarceration on families. Oakland, CA: Ella Baker Center, Forward Together, Research Action Design; Stevenson 2018.

61 Beck et al. 2014; Bick 2007.

62 May, D. C., Applegate, B. K., Ruddell, R., and Wood, P. B. (2014). Going to jail sucks (and it really doesn't matter who you ask). American Journal of Criminal Justice 39, 250–266; see also Goldfarb, Ronald. (1975). Jails: The ultimate ghetto. New York: Anchor Press; Irwin 1985; Wynn 2001.

63 Persons with mental health or substance abuse issues are overrepresented in jails and prisons. An estimated 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates have at least one mental health problem (James & Glaze 2006); for 15 to 24 percent of U.S. inmates, mental illness is categorized as severe. Among women in jails and prisons, the figure is even higher (James & Glaze 2006; Bronson and Berzofsky 2017).

Meanwhile, seven in ten prisoners have pre-prison substance use—drug or alcohol—consistent with substance abuse and dependence (Mallik-Kane & Visher 2008).

64 Walker 2014.

65 McKendy 2018.

66 Griffin, M. (2006). Penal harm and unusual conditions of confinement: Inmate perceptions of hard time in jail. American Journal of Criminal Justice 30(2), 209–226; McKendy 2018.

67 1-2 years out, employment results are primarily driven by an increase among those released pretrial in the joint probability of not having a criminal conviction and being employed and a decrease in the joint probability of having a criminal conviction and being employed. 3-4 years out, increases in employment among those released pretrial is concentrated among defendants who do not have a criminal conviction.

68 As days in detention increase, employers might dismiss employees for their absences, regardless of the reason, although some report that even short stints of between one and three days can lead to dismissal (Kimbrell and Davis 2016).

69 The fact of having been arrested and detained might lead some employers to dismiss employees, the result of having lost trust in them (Boshier and Johnson 1974; Holzer et al. 2007; Ispa-Landa and Loeffler 2016; Pager 2003, 2007; Schwartz and Skolnick 1964; but see Atkin-Plunk and Armstrong 2013), a likelihood increased by being Black or Latino (Pager 2003). Dismissal might also result if employers believe they will become liable for negligent hiring if employees who have been arrested and detained act criminally on the job (Bushway 1998; Connerley, Arvey, and Bernardy 2001; Glynn 1998; Holzer, Raphael, and Stoll 2007).

70 Boshier, R. and Johnson, D. (1974). Does conviction affect employment opportunities? British Journal of Criminology 14, 264–268; Holzer, H. J., Raphael, S., and Stoll, M.A. (2007). The effect of an applicant's criminal history on employer hiring decisions and screening practices: Evidence from Los Angeles. In S. Bushway, M. A. Stoll, and D. F. Weiman, Barriers to reentry? The labor market for released prisoners in post-industrial America, pp. 117–150. NewYork: Russell Sage Foundation; Pager, D. (2003).The mark of a criminal record. American Journal of Sociology 108(5), 937–975; Schwartz, R. D. and Skolnick, J. H. (1964).Two studies of legal stigma. Social Problems 10(2), 133–142; but see Atkin-Plunk, C. A. and Armstrong, G. (2013).Transformational leadership skills and correlates of prison warden job stress. Criminal Justice and Behavior 40(5), 551–568.

71 Jung K. Kim and Yumi Koh, "Pretrial Justice Reform and Black–White Difference in Employment," Applied Economics, October 9, 2021, 1–19, https://doi.org/10.1080/00036846.2021.1976387.

72 Kim and Koh, 2021.

73 Geller and Curtis 2011; Harding, Morenoff, and Herbert 2013.

74 Here housing instability is measured by homelessness, eviction, being unable to pay full rent, and being forced to move in with friends or family.

75 Lutze et al (2013) conduct an outcome evaluation of a reentry housing pilot program in Washington State, which provides housing assistance for high risk and high need people without a viable place to live after leaving prison. They discover lower rates of recidivism among program participants than the comparison group across three outcome measures —new convictions (22% for those in the program compared to 35% in the comparison group), revocations (40% vs 47%), and readmissions to prison (37% vs 56%). Thus, securing stable housing immediately upon release adds to the stability people need to navigate the challenges of reentry.

76 Fines and fees are commonly assessed at each stage of criminal case processing (Bannon et al. 2010). At pre-conviction, defendants are often charged fees for booking, to apply to obtain a public defender, and for fees related to pretrial detention. Court costs are another source of fines, fees, and surcharges, whether individuals are convicted of crime. Additional charges, however, do apply to those who have been convicted and sentenced. These court fines and fees do not include restitution, which is a distinct bucket of fines, and they do not include reimbursements for the use of public defenders, which is charged in several jurisdictions. While incarcerated, for

pretrial or as formal punishment, individuals routinely pay for programs and services, including medical care, work release program participation, per diem, and telephone use. With probation and parole, individuals pay monthly fees for supervision, including electronic monitoring, and administration fees for the installment of monitoring devices, drug testing, mandatory treatment, therapy, and classes. Finally, individuals are responsible for penalties for interest, tardy payments, applications for payment plans, and collection services. These penalties add to and extend individuals' debts, creating overwhelming financial burdens for those who are already struggling mightily to make ends meet (Bannon et al. 2010).

77 Bannon, Nagrecha, and Diller (2010) examined the policies and practices surrounding LFOs in the 15 states with the highest prison populations. They found that fees average in the hundreds or thousands of dollars and can be compounded by additional penalties, such as late fees and interest. Reincarceration for failure to pay CJFOs is also common across these states. Focusing on Washington State, Harris, Evans, and Beckett (2010) analyzed national and state- level court data to assess the prevalence of monetary sanctions in the state and to identify the social and legal consequences of residents' legal debts. Comparing expected earnings to average legal debt, they find that formerly incarcerated white men have nearly equivalent levels of legal debt and earnings, Hispanic men's legal debt comprises 69 percent of their expected earnings, and Black men's legal debt reaches 222 percent of their expected earnings. In a separate paper, Harris, Evans, and Beckett (2011) showed that race and ethnicity played a major role in the amount of fines and fees that justice involved individuals were assessed, contingent on the types of crimes they were being charged with. Not surprisingly, Latinos and Blacks were assessed higher fines and fees, especially when they were arrested, charged, and convicted of certain crimes.
Both Bannon (2010) and Harris, Evans, and Beckett (2010) explain that the consequences of such debt include heightened financial stress; limited access to housing, education, and economic markets; and legal sanctions, such as warrants, arrests, and reincarceration when people miss payments. They also both contend that this form of debt can create significant barriers to reentry— for example, having a driving license suspended and being unable to go to work; having to pay off debt before regaining voting rights; damaging credit; and impeding payment of other financial obligations, such as child support. Further, they do so in ways that magnify already large racial and ethnic gaps in outcomes related to criminal justice contact.

78 This is likely because, unlike court fines, fees, and restitution, court-ordered bail assessments, though required for some pretrial release cases, are not mandatory. One can "choose" to bond out and leave jail, or one can choose not to and remain behind bars; it is one's "choice." Where court-ordered fines and fees are considered, however, one lacks these basic options. Failure to pay is to invite further sanction.

Exhibit K

Sue Burrell

Policy Director Emeritus, Pacific Juvenile Defender Center

Submission to Committee on Revision of the Penal Code
48-Hour Rule for Probable Cause Determinations/Notification of Indigent Defender
Sue Burrell, Policy Director Emeritus, Pacific Juvenile Defender Center
September 21, 2022

Probable Cause Determinations

Background and Context

The Fourth Amendment requires a "prompt" judicial determination of probable cause as a prerequisite to extended incarceration following arrest.[1] Without it, the state has no basis on which to impose such an enormous restraint on personal liberty. Although this fundamental constitutional right was recognized more than 45 years ago, it has been unevenly implemented in California. It has contemporary urgency given the growing evidence that even short periods of improper incarceration may have devastating and lasting effects,[2] and that people of color are especially at risk of wrongful detention.[3]

In 1991, the Supreme Court clarified in *County of Riverside v. McLaughlin*[4] that, generally speaking, a determination of probable cause made within 48 hours of arrest would meet the *Gerstein* requirement of promptness ("the 48-hour rule"). The Court specified that no additional time should be given for holidays or weekends.[5] Four justices, including Justice Scalia, thought that even 48 hours was too long.[6] *Riverside* confirmed that the determination may be done through a non-hearing "paper" review by a judicial officer, or be consolidated into the first court hearing, but must be done within 48 hours of arrest.[7]

Under *Riverside*, 48 hours was the outside limit, and a determination made within that period might still not satisfy the Fourth Amendment. Such a determination may "violate *Gerstein*, for example, if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake."[8] The Court recognized the need for flexibility in individual cases given the inevitable delays in transporting people, handling late night bookings, securing the presence of a magistrate or arresting officer, and other practical realities,"[9] but said there were limits to this flexibility. And significantly, "[t]he fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined

---

1 *Gerstein v. Pugh* (1975) 420 U.S. 103, 124-25. "Probable cause" exists when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime. *People v. Price* (1991) 1 Cal.4th 324, 410. Typically, the judicial officer reviews the police officer's affidavit.

2 See, e.g., Lowenkamp, VanNostrand, & Holsinger, *The Hidden Costs of Pretrial Detention*, Arnold Ventures (2013), pp. 11, 19, https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf.

3 See examples in Burrell, *The 48-Hour Rule and Overdetention in California Juvenile Proceedings* (2016) 20 UC Davis Journal of Juvenile Law & Policy 1, pp. 4-7, https://sjlr.law.ucdavis.edu/archives/vol-20-no-1/BURRELL.pdf.

4 *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 56.

5 *Id*., at pp. 57-58.

6 *Id*., at pp. 59-70. Justice Scalia urged that no more than 24 hours should be needed. (*Id*., at p. 68, and n. 3, dis. opn. of Scalia, J.) As a point of reference, the American Bar Association standards on pretrial release provide that the defendant "should be presented at the next judicial session within [six hours] after arrest" and that "[i]n jurisdictions where this is not possible, the defendant should in no instance be held by police longer than 24 hours without appearing before a judicial officer." (ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007), standard 10-4.1, p. 77), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

7 *Id*., at p. 57.

8 *Ibid.*

9 *Id*., at pp. 56-57.

proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest."[10] Because Riverside County combined the probable cause determination with the arraignment hearing, and allowed extra time for weekends and holidays (as permitted by Penal Code section 825), its practices ran afoul of the 48-hour rule.[11]

Remarkably, given that *Riverside v. McLaughlin* was a California case, neither the California adult statutes nor the juvenile statutes have been changed to conform with the ruling in the more than three decades since it was decided. The Committee should recommend that the statutes be amended to conform state law with the Supreme Court holdings. Whether the determination is performed through a paper review or at the first judicial hearing, the probable cause determination must be made within 48 hours - without extra time for weekends or holidays.

Juvenile Law and Practice in Probable Cause Determinations

California juvenile law is silent on paper reviews of probable cause. With respect to determinations at the first court hearing, current law calls for the court to release the young person unless a "prima facie" showing has been made that the young person comes within the court's jurisdiction,[12] but the timelines fail to meet the *Riverside* limitations. Our juvenile statutes allow 48 hours from the time the youth is taken into custody *excluding nonjudicial days* to file a juvenile court petition;[13] and on top of that, an additional day to bring the youth to court,[14] at which time, the prima facie finding that the youth committed an offense is made.[15] As a result, depending on the day of the week and time a youth is taken into custody, the statutes allow them to be held in custody for 3 to 7 days before a judicial determination is made. This is exactly the scenario disapproved by *Riverside v. McLaughlin*.[16] A 1994 California Supreme Court case approved allowing more than 48 hours for juveniles,[17] but the case appears vulnerable to challenge. The United States Department of Justice applies the 48-hour rule to juveniles in its litigation.[18]

A 2015 Public Records Act request sent statewide to presiding juvenile court judges found that some counties did not rely on the statutes and did provide a paper review of probable cause that conforms with the 48-hour rule, but a majority of those responding did not. Some provided a paper review by a judicial magistrate, but not within 48 hours. Others performed the probable cause determination at the initial court hearing, which was often well beyond 48 hours, and none provided in person hearings on weekends or holidays.[19]

---

[10] *Id.,* at p. 57.

[11] *Id.,* at pp. 47, 58-59.

[12] Welfare and Institutions Code section 635, subdivision (c)(1).

[13] Welfare and Institutions Code section 631, subdivision (a).

[14] Welfare and Institutions Code section 632.

[15] Welfare and Institutions Code section 631, subd. (c)(1).

[16] *County of Riverside v. McLaughlin*, *supra*, 500 U.S. at p. 47.

[17] *Alfredo A. v Superior Court* (1994) 6 Cal.4th 1212. The court held that the formal detention hearing provided for in section 632, subdivision (a), may serve to fulfill the constitutional requirement when the court at such a hearing court makes a determination that sufficient probable cause exists, and where it is held within 72 hours of the juvenile's detention. *Id*., at p. 1232.https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994034709&pubNum=661&originatingDoc=I6ffa03d2fab911d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=8e141bc76c314684b1316936cbc394c7&contextData=(sc.Search)

[18] See, U.S. Department of Justice, Civil Rights Division, *Investigation of the Shelby County Juvenile Court* (2012), pp. 17-18, https://www.justice.gov/sites/default/files/crt/legacy/2012/04/26/shelbycountyjuv_findingsrpt_4-26-12.pdf

[19] The statewide practices are described further in Burrell, *The 48-Hour Rule and Overdetention in California Juvenile Proceedings*, *supra*, 20 UC Davis Journal of Juvenile Law & Policy, *supra*, at pp. 16-17.

Adult Criminal Law and Practice in Probable Cause Determinations

California law is similarly silent on paper probable cause determinations for adults, and the only provision for in-person determinations is in the arraignment statute. That statute calls for the defendant to be taken before a magistrate within 48 hours of arrest, but it allows extra time for Sundays and holidays, and allows the appearance to occur the next day if court is not in session when the 48 hours is up.[20]

A survey of adult court public defenders and other defense counsel in April 2022,[21] indicated that while paper reviews occur in counties where close to 60% of those responding practice, nearly 24% work in counties where the determination is made at the first court hearing, and the remainder work in counties where both forms of determination occur.[22]

In counties where the determination is made at the first court hearing, only one survey responder reported having hearings on weekends or holidays. In those counties, 65% of people arrested on a Thursday are brought to court four days later on Monday, and in some, later than that. Survey responses indicated that a person arrested on Wednesday before the Thanksgiving holiday weekend would spend five to seven days in custody before being brought to court for their probable cause determination.

In the counties that provide paper reviews of probable cause, 25% of those responding say it does not occur within 48 hours. Notably, one responder said that even in Riverside County, which gave rise to *Riverside v. McLaughlin*, the courts follow Penal Code section 825, which as currently written, gives extra time for weekends and holidays.

Approximately 23% of people responding said that they have had clients released at the probable cause determination – nearly one out of every four people. In terms of the impact on detained people of delayed probable cause determinations, survey responders noted:

- Loss of jobs, housing, pets, vehicles, belongings
- Childcare issues, detention of children by child welfare
- Hardship for family
- Emotional trauma/worsening of mental health conditions; abuse in jail
- Exacerbation of medical/health issues; missed medications and doctor appointments
- Interference with school
- Inability to access legal counsel, family, and significant others
- Spending money needed for other things on bail
- Prosecutor using the extra time to try to get more evidence since no counsel involved yet

Almost unanimously, survey responders spoke to the desirability of having counsel involved prior to the probable cause determination.

Notification of Indigent Defense Counsel

While *Gerstein v. Pugh* and *Riverside v. McLaughlin* considered a paper review of probable cause to be permissible, it has become more evident in the past several decades that such cursory review may be

[20] Penal Code section 825.

[21] The survey was sent to members of the California Public Defenders Association listserv during April 2022. Responses were received from seventy-two people. Out of forty-seven people answering a question about where they work, twenty counties were represented, and a total of thirty-four counties were referenced (some people work in more than one county). (The raw survey results are available from Eileen-Manning Villar, eileen@ pjdc.org, or Sue Burrell, sue@pjdc.org.)

[22] *Id.*

inadequate, and that other issues are at play at this initial stage of the legal process. There are strong policy reasons to require that incarcerated people have legal counsel to speak on their behalf at the time of the probable cause determination. As a first step, the county public defender or indigent defense provider should be notified when a person is taken into custody. The Commission should link this issue to the need for earlier legal representation.

The American Bar Association *Standards for Criminal Justice* call for counsel to be provided,

> …[A]as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest…The authorities should promptly notify the defender, the contractor for services, or the official responsible for assigning counsel whenever the person in custody requests counsel or is without counsel."[23]

The *Standards* explain that prompt access means that witnesses can be interviewed promptly lest their memories of critical events fade, or witnesses become difficult to locate. They note that counsel may be able to marshal facts in support of pretrial release from custody, and that counsel's early presence may sometimes help to convince the prosecutor to dismiss unfounded charges, to charge the accused with less serious offenses, or divert the case entirely from the court system.

Accordingly, the *Standards* call for notification of the defender or assigned-counsel programs when a person in custody is without counsel or requests to see an attorney.[24] In addition, they urge defender and assigned-counsel programs to publicize their availability in courts and detention facilities, be prepared to provide emergency twenty-four-hour representation, and conduct daily checks of detention facilities to ascertain whether unrepresented people are present.[25] These provisions are based in fundamental fairness: "Perhaps most important, unless the indigent accused is provided counsel at the earliest possible time, discrimination occurs between the poor defendant and the defendant of financial means: the latter is able to afford counsel and frequently acquires legal representation well before formal commencement of adversary proceedings."[26]

Here, in California, notification of the public defender or indigent defense provider would enable counsel to provide information not discernible from the written probable cause affidavit, and potentially would provide an opportunity for advocacy on release (for juveniles) or bail (for adults). Counsel would already be appointed at the initial hearing, so this would really just move the involvement up to an earlier point in the process when probation and prosecutors are making significant decisions.

It would also enable defenders to mobilize more quickly to check conflicts, contact lawyers if the person already has one, talk to the client to begin investigation, provide cautions about making statements while in custody, advocate in relation to filing decisions, and begin to prepare for the initial hearing. These are protections that any person who could afford counsel would surely procure.

---

[23] ABA, *Standards for Criminal Justice: Providing Defense Services*, (3d Ed. 1992), Standard 5-6.1. Initial provision of counsel, pp. 77, and discussion at pp. 78-81. The Standards noted that this usually occurs before the person's appearance before a judicial officer.
file:///C:/Users/Owner/Desktop/Data%20from%20Work%20PC/Public%20Defenders%20&%20Representation/Detention/48%20hour%20rule/providing_defense_services.authcheckdam.pdf

[24] *Id*., at pp. 77, 79.

[25] *Id*., at p. 80.

[26] *Id., at p. 79.*

Proposed Statutory Changes

For Juveniles

- Codify the holding of *Riverside McLaughlin* either in a new statute, or by amending Welfare and Institutions Code sections 631 and 632. Specify that the judicial determination may be done through a paper review or at the arraignment hearing, but in either case the determination of probable cause must be made within 48 hours of arrest with no exception for holidays, weekends, or other non-judicial days. Require that a record of the decision be made.

- Some of what this submission proposes has already been set into motion. Governor Newsom has just signed legislation requiring notification of the public defender or indigent defense provider in the county within two hours that a youth has been taken into custody, adding Welfare and Institutions Code section 627, subdivision (c), to the Code. (Stats. 2022, ch. 289, § 2, (A.B. 2644 - Holden), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2644.) The Committee should consider whether the new language meets the goal of promptly alerting indigent defense counsel, and whether further guidance is needed on the mechanism for notification.

For Adults

- Codify the holding of *Riverside McLaughlin* either in a new statute, or by amending Penal Code section 825. Specify that the judicial determination may be done through a paper review or at the arraignment hearing, but in either case the determination of probable cause must be made within 48 hours of arrest with no exception for holidays, weekends, or other non-judicial days. Require that a record of the decision be made.

- At a minimum, require that when a person is taken into custody, the public defender or indigent defense provider shall be immediately notified, and in no case later than two hours – as is now required for juveniles pursuant to Welfare and Institutions Code section 627, subdivision (c). Also determine whether "immediate" requires a shorter period for notification, and whether further guidance is needed on the mechanism for notification.

For both juvenile and adults, these changes should be contemplated as necessary short-term changes to bring California into compliance with longstanding Supreme Court holdings, and to afford adults at least the same notification of defense counsel provisions now accorded to juveniles. These are important procedural changes that will help to protect vulnerable Californians against unwarranted deprivation of liberty, and move us in the direction of earlier representation by counsel.

Exhibit L

Letter from The Bail Project

THE BAIL PROJECT
PO Box 750
Venice, CA 90294
(323) 366-0799
hello@bailproject.org

Committee on Revision of the Penal Code
Bail Project Recommendations

1) **Expand Pretrial Data Collection and Reporting.** Currently, there is little visibility to important data from key components of the criminal legal system, such as county jail or prosecution data in California on both an individual and aggregate statewide basis. It is either non-existent, disorganized, piecemeal, or not easily shared with the public and policymakers. Having good data informs legislators and voters of potential systemic problems, stress points and solutions, while holding elected officials and the criminal legal system accountable for the best outcomes. A robust data collection and reporting system would highlight the successes and problem points of our pretrial system, and point towards potential improvements, as well as help lawmakers ensure resources are directed to areas where they are most needed. Suggested revisions are provided in the Care First California omnibus bill draft, Preserving the Presumption of Innocence.

2) **Eliminate Pretrial Risk Assessments.** Courts should not rely on pretrial risk assessment tools, to determine, or to inform a decision about, what conditions of release to impose or whether to incarcerate a accused person pending resolution of a case. Pretrial Risk Assessments are biased because they are engineered to forecast aggregate group risk, without any consideration for specific individuals. These automated profiles are inherently discriminatory against Black and brown people, poor people, and communities of color that have been disproportionately impacted by the structural inequalities prevalent in the U.S. criminal justice system. The existing field of pretrial risk assessment tools should be replaced with a supportive release assessment based on individual and community assets that will not compromise public safety or constrain judicial decision making while protecting the right of presumed innocence.

3) **Conditions of Release.** When determining which conditions of release a person should be assigned, courts must consider not only the relevant risks but also the potential collateral consequences of conditions. Collateral consequences such as loss of employment provides another reason for courts to consider non-restrictive measures first. These measures such as supportive services address risk without imposing undue collateral consequences.

    - **Codify Least Restrictive Conditions of Release.** More than half of states have laws that require courts to impose the least restrictive conditions necessary to ensure the appearance of the person accused and/or public safety. California has no requirement to consider least restrictive conditions. Conditions of release often lead to net-widening, meaning they increase the likelihood that a person may violate those conditions (simply because they are onerous), and the consequent likelihood that they will be penalized with pretrial detention as a result. To protect against unnecessary incarceration and other unintended consequences, those eligible for pretrial release should be released on the least restrictive condition or conditions reasonably necessary to address satisfactorily the a relevant risk that the court has determined by clear and convincing evidence that the individual is significantly likely to abscond, obstruct justice, violate an order of protection, or cause significant harm to a reasonably identifiable person.

      The vast majority of people can and should be released on personal recognizance or unsecured appearance bonds without supervision. These should be paired with voluntary supportive services such as text court date reminders, transportation assistance, and access/referrals to support services including educational, vocational, or housing

assistance. These supportive services are important and have been demonstrated to improve court appearance rates.
Restrictive conditions include:

- Mandatory therapeutic treatment or social services;
- A requirement to seek to obtain or maintain employment or maintain an education commitment;
- A restriction on possession or use of a weapon;
- A restriction on travel;
- A restriction on contact with a specified person;
- A restriction on a specified activity;
- Supervision by a pretrial services agency or another person;
- Active or passive electronic monitoring;
- Alcohol or drug monitoring;
- House arrest

- **Limit the use of electronic monitoring.** Widespread electronic monitoring is not an alternative to incarceration; a person subjected to electronic monitoring must adhere to extremely restrictive rules that limit their movements. There is little evidence that electronic monitoring is effective; studies evaluating the use of electronic monitoring with a general pretrial population show that GPS supervision is no more or less effective than traditional, non-technology based pretrial supervision in reducing the risk of failure to appear to court or the risk of rearrest. In fact, electronic monitoring is shown to have negative effects on employment, parenting, social relationships, and community involvement. Additionally, electronic monitoring perpetuates racial and economic disparities, imposes a burden both on municipalities and those on supervision, and raises serious privacy concerns. Because of the reasons outlined above, it should only be utilized as a true alternative to detention in jail. This means that it should only be ordered in cases in which the person would otherwise be eligible for detention under Article 1, Section 12 of the California Constitution.

Conditions of release should not be permanent or fixed for the duration of a person's case pendency. All conditions of release should be eligible for review at fixed intervals (ideally every 30 to 60 days). A defense counsel should also be permitted to submit motions for hearings at any frequency that they determine as relevant and based on compelling and changing needs of their clients.

When courts do require a condition of release, any associated administrative costs should be covered by the jurisdiction, these include but are not limited to fees associated with the installation and use/monitoring of electronic monitoring and substance use monitoring or treatment.

4) **Court Appearances.** Throughout the pretrial process, it is important that the person charged makes all required court appearances. Even one failure to appear in court can result in the immediate revocation of pretrial release, bail, and even trigger warrants for arrest. The reason for swift responses to failures to appear is directly tied to concerns that someone may attempt to flee from prosecution rather than participating in the legal process. But there are many reasons why someone may not attend a required court hearing – most of which are unintentional and not an attempt to willfully avoid prosecution. These include but are not limited to: illness, hospitalization, inability to take time off work or find childcare, lack of transportation, etc. The failure to consider the context around non-appearance adversely impacts low income and

minority communities because low-income communities of color are more likely to experience destabilizing conditions as a result of structural poverty and racism.

The following recommendations are intended to improve court appearances:

- **Make nonessential court hearings optional.** When possible, continuances, pretrial conferences, non disposition hearings, hearings related to discovery, etc. should all be optional for defendants. This is how the civil legal system operates - with lawyers making the appearances for their clients in non-essential matters.
- **Develop a unified court reminder system.** There is growing evidence that court reminders improve court appearance rates. Court date notification programs can also help save jurisdictions costs. Court date reminders should be provided to people released pretrial to remind them of the day, time, and location of their court appearance. Research suggests that automated calls, postcards, and text messages are all effective methods of improving court appearance rates. Court reminders should be provided in multiple formats and multiple languages to best reach the diverse pretrial population.
- **Addressing Barriers to Court Appearances.** Research has identified childcare, employment, or other logistical issues such as transportation, as primary reasons people do not show up for their scheduled court appearances. Provision of supportive services such as transportation assistance and on-site childcare could improve court appearances. Additionally, though potentially outside of the scope of the committee, it may be beneficial to consider legislation that would require employers to allow employees to attend mandatory court appearances.

Through our Community Release with Support (CRwS) Model, we have demonstrated that court reminders and referrals to voluntary support services that address common barriers reduce failure to appear rates. Since our Los Angeles site launched in 2018, we have bailed out 580 people there, allowing them to return to their families, jobs, and communities, and to fight their cases from a position of freedom. Once our clients are free, we provide court reminders and transportation support as needed while also providing voluntary referrals to social service providers in the community. The result: our Los Angeles clients have returned to 2,889 court dates, for a 97% court appearance rate.

Additional recommendations to improve court appearances include:

- **Improve court scheduling and rescheduling practices.** Expanding hours and days of operation and allowing individuals to schedule hearings on days or at times more convenient to them such as nights or weekends will mitigate some barriers such as work obligations to appearance. Additionally, providing options to reschedule, such as through an online portal or through regular and accessible walk-in hours, will help individuals avoid a missed appearance.
- ***Additional Research Required:*** **Virtual Court.** Providing an option for individuals to take part in court hearings remotely (particularly for nonessential hearings) could remove potential barriers to appearance, such as transportation, childcare, or missed work and could make court more accessible for those with physical disabilities. Still, this option requires additional research given practical concerns such as lack of access to the internet and adequate technology in many parts of the state as well as concerns about the constitutionality of virtual hearing and their potential impact on case outcomes.

The following recommendations are intended to mitigate the impact of non appearance:

a. **Institute non-appearance grace periods.** Individuals should have a straightforward opportunity to resolve scheduling conflicts or missed court appointments without fear of a warrant or additional charge. Warrant grace periods grant accused people a certain

amount of time (ideally a few days to weeks) to voluntarily appear in court after a missed court date before a judge may issue a bench warrant. For example, courts may create an Open Hours Court where anyone who has missed a court appearance can address their care or reschedule within a certain amount of time without fear of returning to jail.

5) **Community-Based Pretrial Services.** Probation departments and other law enforcement agencies are not suited to deliver pretrial services, as their orientation is towards maximally expanding supervision and monitoring, as opposed to working with people to remove barriers to their return to court. Independent, non-law enforcement agencies are far better equipped to deliver these services.

   Each county should be required to establish or identify an independent and neutral pretrial services agency to coordinate with courts, community-based organizations, defender offices, prosecutors, law enforcement agencies, health departments and other service providing agencies to provide pretrial services. The purpose of this entity is to help promote public safety by preparing Individualized Safety Plans, supporting people to appear at their court dates and providing access to services designed to facilitate successful outcomes. Case management must be provided by the independent pretrial services entity or in coordination with community-based non-profit organizations that do not report to, nor should be required to share documents with, law enforcement. The entity should not have any law enforcement function. The entity should also be independent of any law enforcement agency, including the courts or any probation department. Under no circumstances should the pretrial services entity supervise electronic monitoring, drug testing, search and seizure conditions, or other punitive conditions. This entity should manage and distribute all state and local funds designated for pretrial services to community-based organizations, and non-law enforcement, non-profit services agencies, except for the limited costs of overhead.

6) **Clarify Ability to Pay Standards.** Codify ability to pay standard established under Humphrey as "present ability to pay" meaning without borrowing money, selling personal property, obtaining a bond or otherwise incurring debt. The bail amount must not cause a substantial hardship to the individual or their family. People dependent on public benefits, people living below a defined income level, unhoused people, students, and others determined to be "indigent" by the court would be considered unable to pay any amount and therefore should only have bond set in an unsecured format but may not be detained for an inability to pay. Additionally, a procedural framework for determining ability to pay in which the prosecutor has the burden of proving that money bail is necessary.

7) **Addressing Parole and Probation Technical Violations.** No person charged with a violation of probation, parole, post-release community supervision, or mandatory supervision should be detained or held on secured financial conditions of release pending adjudication of the violation unless the person is charged with a new offense and the court with jurisdiction over the new offense determines that pretrial detention is necessary pursuant to applicable state and federal law.

8) **Expand Cite & Release.** Expand current cite and release to include all felonies that are not defined as "serious" or "violent" felonies under the Penal Code or other carefully considered exceptions and remove the expansive loopholes so that officers cannot undermine the intent of the law at their own discretion. Suggested revisions are provided in the Care First California omnibus bill draft, Preserving the Presumption of Innocence.

9) **Presumption of Release for All Offenses.** More than half states have codified a presumption of release on recognizance or non-monetary conditions for some, if not all, people who are eligible

for bail. California is in the minority of the states with the statutory presumption limited to only misdemeanor cases. The presumption of release on recognizance or non-monetary conditions should be expanded to include all felonies that are not defined as "serious" or "violent" felonies under the Penal Code or other carefully considered exceptions. This policy change should be paired with the codification of least restrictive conditions of release so that those legally presumed innocent are able to return home to their communities while awaiting trial without being further exposed to the harms of the criminal legal system. Suggested revisions are provided in the Care First California omnibus bill draft, Preserving the Presumption of Innocence.

10) **Establish the Right to Counsel Prior to Initial Appearance.** In California, there is no state funding for public defense services; public defender offices are funded at the county level and funding levels can fluctuate depending on the economy and tax base. But research shows the importance of improved access to counsel; investments in pre-arraignment representation are more likely to be released and more likely to have a lower bail amount imposed. Therefore, the state should provide additional funding to public defender offices across the state to ensure that those accused are able to access counsel prior to arraignment.

11) **Identify and Decriminalize Non-Violent Offenses that Target the Unhoused and People with Mental and Substance Use Needs.** Homelessness, poor mental health, and substance use are intersectional issues; In 2020, about 25% of all unhoused adults in Los Angeles County had severe mental illnesses and 27% had a long-term substance use disorder. The infractions that unhoused people are accused of reflect the reality of living outside, untreated mental health, and illicit substance use. Unhoused people are frequently ticketed for things like loitering, drinking alcohol in public, and lying down or sleeping in public places. Unhoused people are also often arrested in connection with old offenses such as warrants for failure to appear for court and failure to stay compliant with the terms of their probation or parole. Being unhoused makes it intrinsically more difficult to avoid these charges given transportation issues, competing needs (e.g., food, shelter), and practical concerns around being able to keep track of days and times when they may not have access to technology. Additionally, those using substances, likely as a coping mechanism for untreated mental illness or homelessness, are being arrested for nonviolent drug offenses.

    The cycle of incarceration further exacerbates underlying causes/contributing factors to homelessness, poor mental health, and substance use. Decriminalization paired with diversion to community-based providers that can break this cycle by providing treatment and a connection to supportive services.

12) **Cap the Bail Schedule.** If California continues to rely on the bail schedule in setting initial bail amounts, County bail schedules should be capped as they are the most onerous bail schedules in the country - the median bail amount in California is $50,000, more than five times the median amount in the rest of the nation. But in a country where less than half of Americans could cover even a $400 emergency expense such as a visit to the emergency room, these bail amounts result in the detention of people who are legally presumed innocent for no other reason than a lack of funds. It is recommended that The uniform countywide bail schedules must cap bail amounts at no more than 10% of the Median Household Income of that County's residents as determined by the Census Bureau. Additionally, we recommend that bail amounts may only be lowered from the set amount in the schedule so that it may be affordable, not increased.

13) **End Cash Bail.** On any given day, nearly half a million people sit in jail cells, even though they have not been convicted of a crime. People in pretrial detention comprise more than two-thirds of the country's jail population and though they are legally presumed innocent, they will suffer the

harms of incarceration *unless* they have enough money to buy their freedom. The cash bail system criminalizes poverty, perpetuates racial inequality, and is a primary driver of mass incarceration.

Bail reform initiatives across the country have maintained both the safety of our communities while protecting constitutional freedoms. Many jurisdictions that have ended or reduced reliance on cash bail in recent years demonstrate positive public safety outcomes:

- Since 1992, our nation's capital has not relied upon cash bail. On average, more than 90% of its pretrial population are released; close to 90% make every single court appearance and are never rearrested for a criminal offense; and 98% are not rearrested for a violent offense.
- In 2016, New Mexicans amended the state constitution to prohibit judges from imposing unaffordable cash bail and enable judges to release many defendants without bond. Since implementation, crime rates have dropped across the state.
- In 2017, the New Jersey legislature passed a law largely eliminating the use of cash bail. This led to a decrease in those detained pretrial and a reduction in violent crime by 16% over two years.

Cash bail should be eliminated entirely, and replaced with a non-wealth based system that prioritizes pretrial release for the vast majority of people accused of crimes, invests in non-carceral community based supports and alternatives to incarceration, and limits pretrial detention so that it is a rare exception.